DOCKET

SUPREME COURT

No. 09-60
Title: Jose Angel Carachuri-Rosendo, Petitioner
v.
Eric H. Holder, Jr., Attorney General
Docketed: July 16, 2009
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (07-61006)
Decision Date: May 29, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 15 2009	Petition for a writ of certiorari filed. (Response due August 17, 2009)
Aug 12 2009	Order extending time to file response to petition to and including September 16, 2009.
Aug 17 2009	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Aug 17 2009	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Aug 17 2009	Brief amicus curiae of Center for Court Innovation filed.
Sep 2 2009	Order further extending time to file response to petition to and including October 16, 2009.
Oct 13 2009	Order further extending time to file response to petition to and including November 13, 2009.
Nov 13 2009	Order further extending time to file response to petition to and including November 16, 2009.
Nov 16 2009	Brief of respondent Eric H. Holder, Jr., Attorney General filed.
Nov 24 2009	DISTRIBUTED for Conference of December 11, 2009.
Nov 25 2009	Reply of petitioner Jose Angel Carachuri-Rosendo filed. (Distributed)
Dec 14 2009	Petition GRANTED.
Jan 4 2010	SET FOR ARGUMENT ON Wednesday, March 31, 2010.
Jan 28 2010	Joint appendix filed. (Statement of costs filed)
Jan 28 2010	Brief of petitioner Jose Angel Carachuri-Rosendo filed.
Feb 4 2010	Brief amici curiae of National Association of Federal Defenders and Families Against Mandatory Minimums filed.
Feb 4 2010	Brief amici curiae of Asian American Justice Center, et al. filed.
Feb 4 2010	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Feb 4 2010	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.

Feb 4 2010	Brief amici curiae of Organizations Representing Asylum Seekers filed.
Feb 23 2010	CIRCULATED.
Mar 1 2010	Brief of respondent Eric H. Holder, Jr., Attorney General filed. (Distributed)
Mar 24 2010	Reply of petitioner Jose Angel Carachuri-Rosendo filed. (Distributed)
Mar 31 2010	Argued. For petitioner: Sri Srinivasan, Washington, D. C. For respondent: Nicole A. Saharksy, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
09-60 JUL 15 2009
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case:

Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

PARTIES TO THE PROCEEDING

Petitioner is Jose Angel Carachuri-Rosendo, petitioner below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at ___ F.3d ___, 2009 WL 1492821. The decision of the Board of Immigration Appeals (App. B, *infra*), which heard the matter en banc, is reported at 21 I. & N. Dec. 382. The decision of the Immigration Judge (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2009. App., *infra*, 1a-10a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. D, *infra*, 76a-82a.

STATEMENT OF THE CASE

The court of appeals' decision in this case squarely raises an issue on which there is an acknowledged conflict among the circuits, *viz.*, whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession. Two courts of appeals, including the court of appeals below, have

held that an alien has been "convicted" of an "aggravated felony" in that situation. Four courts of appeals have reached the opposite conclusion. The Board of Immigration Appeals (BIA) agrees with the latter courts that an alien convicted of simple possession cannot be considered "convicted" of an "aggravated felony" on the theory that he *could have been* prosecuted as a recidivist possessor, if there in fact was no prosecution as a recidivist and hence no finding by a judge or jury of any valid prior conviction. The issue is a recurring and important one—as the BIA has recognized—because an alien deemed "convicted" of an "aggravated felony" upon a conviction for simple drug possession faces mandatory removal from the country. This Court's review is warranted.

1. An alien convicted of an "aggravated felony" faces a number of adverse consequences under the Immigration and Nationality Act (INA). Of particular salience here, an alien subject to removal, if convicted of an aggravated felony, is categorically ineligible to petition the Attorney General for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3).

The INA defines an "aggravated felony," in pertinent part, as "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) in turn defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act [CSA]." 18 U.S.C. § 924(c)(2). Simple possession of drugs—*i.e.*, possession with no finding of an intent to distribute—ordinarily constitutes only a misdemeanor under the CSA, *see* 21 U.S.C. § 844(a), and

thus fails to qualify as an aggravated felony. But in the case of a defendant with a previous conviction for simple possession, the prosecutor may seek a recidivist sentencing enhancement, in which event the defendant would face a felony sentence of up to two years of imprisonment upon the judge's determination of a valid prior conviction for simple possession. *Id.*; *see* 21 U.S.C. § 851.

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), this Court considered the circumstances in which a state law drug possession offense qualifies as a "drug trafficking crime"—and hence an "aggravated felony"—under the INA. *Lopez* addressed, in particular, whether a possession offense "made a felony under state law but a misdemeanor under the Controlled Substances Act is a 'felony punishable under the Controlled Substances Act,'" and thus is a "drug-trafficking crime" for purposes of the INA's definition of "aggravated felony." 549 U.S. at 50 (quoting 18 U.S.C. § 924(c)). The Court found it irrelevant whether state law makes possession a felony; what matters instead is whether the state offense "proscribes conduct punishable as a felony under" the CSA. *Id.* at 60. A contrary conclusion, the Court explained, "would often turn simple possession into trafficking," which would be inconsistent "with any commonsense conception of 'illicit trafficking.'" *Id.* at 53-54. Because Lopez's state law simple possession offense would fail to constitute a felony under the CSA, the offense failed to qualify as an "aggravated felony" under the INA. Lopez accordingly retained eligibility to seek cancellation of removal. *See id.* at 52.

2. Petitioner is a native and citizen of Mexico who entered the United States with his parents when he was four years old. App., *infra* 13a; Pet. C.A. Br. 8; BIA Tr. 1; *see* IJ Tr. 2. Petitioner became a lawful permanent resident in 1993, and worked as a carpet installer from the time he was seventeen years old. App., *infra*, 1a; Pet. C.A. Br. 6, 8; IJ Tr. 28. Petitioner's fiancée is a United States citizen with whom he has four children, each of whom is also a United States citizen. BIA Tr. 1; Pet. C.A. Br. 8; *see* IJ Tr. 26.

On October 28, 2004, petitioner pleaded guilty to simple possession of zero to two ounces of marijuana, a misdemeanor violation of Texas law, Tex. Health & Safety Code Ann. § 481.121(b). App., *infra*, 1a-2a; Pet. C.A. Br. 6. He was sentenced to 20 days of confinement. *Id.* at 2a. On November 15, 2005, petitioner pleaded *nolo contendere* to possessing a tablet of Xanax for which he had no prescription, also a misdemeanor under Texas law, Tex. Health & Safety Code Ann. §§ 481.117(b), 481.104(a)(2). App., *infra*, 2a; IJ Tr. 33-34. Although the State could have sought to prosecute petitioner as a recidivist offender, *see* Tex. Penal Code § 12.43 (providing for recidivist sentencing enhancement if shown at trial that offense is second or subsequent misdemeanor), the State elected to forgo any recidivist charge. Petitioner was sentenced to 10 days in confinement. App., *infra*, 2a; Pet. C.A. Br. 6.

3. On September 14, 2006, the federal government initiated removal proceedings against petitioner on the basis of his misdemeanor conviction for possessing a tablet of Xanax. App., *infra*, 2a, 72a; Pet. C.A. Br. 6. The government sought petitioner's

removal under 8 U.S.C. § 1227(a)(2)(B)(i), which provides for removal of an alien who "has been convicted" of violating "any law or regulation of a State . . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana." Petitioner, appearing pro se before the immigration judge (IJ), applied for cancellation of removal. App., *infra*, 2a, 72a; Pet. C.A. Br. 6; *see* 8 U.S.C. § 1229b(a).

On December 19, 2006, the IJ issued an order finding petitioner removable based on his possession conviction, and further finding petitioner categorically ineligible for cancellation of removal on the ground that his conviction qualified as an "aggravated felony." App., *infra*, 72a-75a. The IJ reasoned that petitioner's "second controlled substance conviction in state criminal proceedings" would have the "potential" to give rise to a felony sentence under federal law if he were prosecuted as a recidivist possessor. *Id.* at 74a.

4. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA). The BIA explained that the courts of appeals disagree on "whether, and under what circumstances, a State offense of simple possession . . . qualifies as an aggravated felony based on its correspondence to the Federal felony of 'recidivist possession.'" App., *infra*, 17a. Emphasizing that the issue is "important in general," the BIA observed that it "strive[d] for as consistent a nationwide application of the immigration laws as possible." *Id.* at 22a. The BIA elected to hear petitioner's appeal en banc after choosing it "as the vehicle for articulating [its] analytical approach to the 'recidivist possession' issue." *Id.* at 22a n.5.

The BIA recognized that, under this Court's decision in *Lopez*, an alien convicted of a state offense could be considered "convicted" of an "aggravated felony" under the INA only if the offense conduct would have been punishable as a felony under federal law. App., *infra*, 14a-15a. In the BIA's view, a state possession conviction could be deemed punishable as a felony under federal law due to recidivism only if "the State offense corresponds in a meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism." *Id.* at 26a. The BIA thus concluded that a state possession conviction fails to qualify as an aggravated felony based on recidivism "unless the State successfully sought to impose punishment for a recidivist drug conviction"—that is, unless the defendant's "status as a recidivist" was "admitted or determined by a court or jury within the prosecution for the second drug [possession] crime." *Id.* at 27a-28a. The BIA observed that the Department of Homeland Security (DHS) had initially objected to that approach, but had "modified its position" after argument and "concede[d] that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to 'recidivist possession' unless the State actually used those laws to prosecute the [defendant]." *Id.* at 31a.

The BIA acknowledged that its approach disagreed with that of the Fifth and Seventh Circuits. App., *infra*, 17a-18a, 28a-29a (discussing *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), and *United States v. Pacheco-Diaz*, 506 F.3d 545, 548-49 (7th Cir. 2007)). While the BIA ex-

plained that its approach should govern "in the absence of controlling circuit law," it concluded that the Fifth Circuit's controlling precedent compelled a contrary resolution in this case. *Id.* at 22a. Accordingly, although the BIA determined that petitioner "has not been convicted of an aggravated felony," it considered itself "constrained" by Fifth Circuit precedent to affirm the IJ's decision holding petitioner ineligible for cancellation of removal. *Id.* at 28a-29a.[1]

5. The court of appeals affirmed. App., *infra*, 1a-10a. The court concluded that its pre-*Lopez* decision in *Sanchez-Villalobos*, and its post-*Lopez* decision in *United States v. Cepeda-Rios*, 530 F.3d 333 (5th Cir. 2008), "control[led]" the case. App., *infra*, 4a. Under those decisions, conviction of a state possession offense constitutes conviction of an aggravated felony if the offense is an alien's "second possession offense" and it "therefore[] could have been punished as a felony under the CSA's recidivism provision"—even if no recidivism charge in fact was brought. *Id.* at 4a-5a. The court acknowledged the existence of a "circuit split" on whether an alien qualifies as an aggravated felon in the circumstances of this case, with the "Seventh Circuit agree[ing] with this court's ap-

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[1] In an opinion concurring in the result, two Board Members concluded that no Fifth Circuit precedent bound the Board but that petitioner had been convicted of an aggravated felony. App., *infra*, 33a-69a. In their view, an alien with a prior conviction could be deemed convicted of recidivist possession under *Lopez* regardless of whether the State in fact had prosecuted him as a recidivist, and indeed, even in "the absence of a State[] recidivism statute." *Id.* at 48a.

proach" and the "First, Second, Third, and Sixth Circuits hav[ing] adopted the approach the BIA advocated in its *en banc* opinion in this case." *Id.* at 8a n.5 (citing cases).

REASONS FOR GRANTING THE PETITION

There is a mature and acknowledged conflict among the courts of appeals on whether an alien convicted of simple drug possession can be deemed "convicted" of an "aggravated felony" on the theory that he could have been prosecuted as a recidivist, even if he in fact was not prosecuted as a recidivist and no court or jury thus made such a finding in connection with his conviction. Not only have six courts of appeals resolved the issue, but the BIA has established that its approach will govern in removal proceedings in any circuit yet to issue a controlling decision. The issue is a recurring and important one for the many aliens subject to mandatory removal under the approach of the court of appeals below, and this case presents a highly suitable vehicle for resolving the conflict. In addition, the court of appeals' decision cannot be squared with the plain terms of the governing statutes. This Court therefore should grant review.

A. THERE IS A DEEP AND ACKNOWLEDGED CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

1. The court of appeals explicitly acknowledged the existence of a 4-2 "circuit split" on whether an alien in petitioner's circumstances can be considered convicted of an aggravated felony under the INA. App., *infra*, 8a n.5. Two courts of appeals have held

that a second state conviction for simple possession constitutes conviction of an aggravated felony regardless of whether there was any recidivism finding by the convicting judge or jury. The court below reached that conclusion. App., *infra*, 5a, 9a-10a; *see United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5th Cir. 2005) (applying eight-level enhancement to sentence on ground that second state possession offense constitutes an "aggravated felony" under the CSA). And the Seventh Circuit has reached the same conclusion, holding that "an alien's second (or subsequent) state conviction for simple drug possession amounts to an aggravated felony in terms of a felony punishable under the [CSA]," even "when the state did not treat the alien as a recidivist." *Fernandez v. Mukasey*, 544 F.3d 862, 866 (7th Cir. 2008) (internal quotation marks omitted), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009); *see United States v. Pacheco-Diaz*, 506 F.3d 545, 548-49 (7th Cir. 2007) (sentencing context), *reh'g denied*, 513 F.3d 776 (2008).

By contrast, four circuits have held that an alien convicted a second time for simple possession cannot be considered "convicted" of an aggravated felony in the absence of any recidivism finding in the proceedings before the convicting court. To begin with, in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), the Third Circuit reversed a ruling denying cancellation of removal to an alien twice convicted of misdemeanor drug offenses. Observing that "[o]ne cannot suffer the disabilities associated with having been convicted of an aggravated felony unless one has been *convicted* of a felony," the Third Circuit con-

cluded that the alien's second misdemeanor offense failed to constitute an aggravated felony because his "[recidivist] status was never litigated as part of . . . the second misdemeanor proceeding." *Id.* at 136, 138. Similarly, in *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), the First Circuit held that an alien's second misdemeanor possession conviction failed to constitute a drug trafficking "aggravated felony" because the record associated with the second conviction "contain[ed] no reference to [the alien's] prior conviction, or to any other factor that would hypothetically convert his [second] state misdemeanor conviction into a felony under a federal law." *Id.* at 86.

The Second and Sixth Circuits, in decisions postdating this Court's decision in *Lopez*, have joined the First and Third Circuits. In *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008), the Sixth Circuit held that an alien's second conviction failed to amount to an aggravated felony under the INA because his "second drug-possession conviction made no reference to his first such conviction." *Id.* at 448. The Second Circuit later agreed, holding "that a second conviction for simple drug possession under state law is not a felony under the [CSA] simply because it *could have been* prosecuted as a recidivist offense under 21 U.S.C. § 844(a)." *Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008). Instead, the court explained, if an IJ denies cancellation of removal on the basis of a prior conviction, "the fact of recidivism must be reflected in the conviction the government seeks to classify as an aggravated felony," rather than "merely in [a defendant's] underlying conduct." *Id.*

at 217.[2] Both of those circuits, like the Seventh Circuit and the court of appeals below, have explicitly recognized the division of authority. *See Alsol*, 548 F.3d at 213-14; *Fernandez*, 544 F.3d at 872 & n.8; *Rashid*, 531 F.3d at 443-445; App., *infra*, 8a n.5.

The 4-2 conflict among the courts of appeals is mature and entrenched, and can be resolved only by this Court. Four courts of appeals have now addressed the issue raised by this case following this Court's decision in *Lopez*, and those four courts have divided 2-2. The competing opinions thoroughly canvass the arguments on both sides of the issue, and the court of appeals below and the Seventh Circuit have considered and rejected the majority view. And despite its recognition of the conflict, the Seventh Circuit has refused to rehear the issue en banc. *See Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009); *see also United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), *reh'g denied*, 513 F.3d 545 (2008).

2. In addition to the 4-2 conflict among the courts of appeals, the BIA, "the agency with the expertise in immigration matters," *Omari v. Holder*, 562 F.3d 314, 322 (5th Cir. 2009), has addressed and resolved the issue in the proceedings below. Sitting en banc,

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[2] The Ninth Circuit has also ruled that a second misdemeanor offense fails to constitute an aggravated felony, but in doing so it relied on an en banc decision that has since been rejected by this Court. *See Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002) (en banc)); *United States v. Rodriquez*, 128 S. Ct. 1783, 1787-93 (2008) (rejecting approach taken in *Corona-Sanchez*).

the BIA agreed with the majority of courts of appeals, concluding that an alien's second conviction for misdemeanor possession constitutes conviction of an aggravated felony only if the individual's "status as a recidivist drug possessor [was] . . . admitted or determined by a court or jury within the prosecution for the second drug crime." App., *infra*, 28a. The two courts of appeals to have adopted the contrary view—the Fifth Circuit below and the Seventh Circuit—have considered the BIA's resolution but have declined to adopt it.

The BIA decision is especially significant in light of the Board's prescription that its resolution now governs removal proceedings in any circuit in which the court of appeals has yet to issue a controlling decision. App., *infra*, 32a-33a. As a result, the approach of the court of appeals below governs in two circuits, the contrary approach under which an alien in petitioner's circumstances fails to qualify as an aggravated felon governs in four circuits, and the BIA's agreement with that majority approach governs removal proceedings in all remaining circuits. The upshot is that, in the two circuits that have jurisdiction to review over one-quarter of the immigration proceedings completed in this country each year, an alien in petitioner's position is categorically ineligible to seek cancellation of removal. *See* Office of Planning, Analysis, and Technology, U.S. Dep't of Justice Executive Office for Immigration Review, FY 2008 Statistical Year Book, at B6 tbl.2A (2009), *available at* http://www.usdoj.gov/eoir/statspub/fy08syb.pdf (collecting total immigration court completions by court). But in every other circuit, an identically-situated alien would have an opportunity

to obtain cancellation of removal and thus to remain in the United States. There is no justification for permitting that stark disparity of treatment to persist, particularly in view of the Constitution's contemplation of a "uniform Rule of Naturalization." U.S. Const. art. I § 8, cl. 4.

B. THE QUESTION PRESENTED IS HIGHLY IMPORTANT AND RECURRING, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT

1. a. As the BIA recognized in its en banc opinion, the proper treatment under the INA of a second or subsequent conviction for simple drug possession is "important in general," and is deserving of a uniform national resolution. App., *infra*, 22a. That six courts of appeals have issued controlling decisions on the issue further attests to its significance. Given the frequency with which defendants are convicted of simple drug possession, there is no reason to suppose that the issue's significance will abate over time.

Indeed, the issue continues to arise frequently in the immigration context. Several petitions for review that raise the question presented in this case are currently pending in the Fifth Circuit alone. *See, e.g.*, *Lemaine v. Holder*, Dkt. No. 08-60286 (5th Cir. filed Apr. 2, 2008); *Young v. Holder*, Dkt. No. 08-60278 (5th Cir. filed Mar. 28, 2008); *Martinez-Valero v. Holder*, Dkt. No. 08-60234 (5th Cir. filed Mar. 20, 2008); *Donnoli v. Holder*, Dkt. No. 08-60168 (5th Cir. filed Feb. 27, 2008). In addition, the same issue arises in criminal cases. *See* 8 U.S.C. § 1326(b) (increasing maximum sentence for illegal re-entry where "removal was subsequent to a conviction for

commission of an aggravated felony"); U.S.S.G. § 2L1.2 (providing for upward adjustment for defendant convicted of an "aggravated felony"). The Sentencing Guidelines make clear that the "the term 'aggravated felony'" in the criminal context has the same meaning as in the immigration context. U.S.S.G. § 2L1.2 & cmt. n.3(A). And criminal defendants regularly file appeals in the Fifth Circuit solely to challenge an aggravated felony designation.[3]

The uncertainty caused by the conflict frustrates the ability of defense counsel and prosecutors to offer a defendant charged with a possession offense meaningful advice concerning the immigration consequences of a guilty plea or conviction. *See INS v. St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their decisions."). Under 8 U.S.C. § 1226(c)(1)(B), the Attorney General must detain any alien removable for violating a state law related to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)(i). Consequently, any alien whom the government seeks to remove for a controlled sub-

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[3] *See, e.g., United States v. Gonzalez*, No. 08-20753, 2009 WL 1687797 (5th Cir. June 16, 2009) (per curiam); *United States v. Rodriguez-Montelvo*, No. 08-50979, 2009 WL 1685153 (5th Cir. June 16, 2009) (per curiam); *United States v. Mendez-Monroy*, No. 08-50790, 2009 WL 1676117 (5th Cir. June 16, 2009) (per curiam); *United States v. Alfaro-Cardenas*, No. 08-40779, 2009 WL 1676095 (5th Cir. June 16, 2009) (per curiam). The issue continues to arise in other circuits as well. *See, e.g., United States v. Ayon-Robles*, 557 F.3d 110, 112-13 (2d Cir. 2009) (per curiam) (applying court's decision in *Alsol* in the criminal context).

stance offense will automatically be detained and subject to the circuit law that governs the jurisdiction of his detention. *See* 8 U.S.C. § 1252(b)(2) (providing that any "petition for review [of an order of removal] shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"). And because the site of immigration detention bears no necessary connection to the site of conviction or residence, defense attorneys and prosecutors will be unable to predict with certainty what law will be applied. In addition, the approach of the court of appeals below tends to "undermine the State's ability to negotiate plea agreements with defendants [who] would admit guilt to drug possession with the understanding that their criminal records would reflect [a] misdemeanor," but would refuse to do so when an "aggravated felony" is at stake. *Alsol*, 548 F.3d at 217.

b. Whether an alien is properly deemed "convicted" of an "aggravated felony" has substantial and far-reaching consequences for immigrants and their families. An alien convicted of an aggravated felony is subject to removal, 8 U.S.C. § 1227(a)(2)(A)(iii); presumed removable, 8 U.S.C. § 1228(c); ineligible to seek judicial review of a removal order, 8 U.S.C. § 1252(a)(2)(C); and, of course, ineligible to seek cancellation of removal, 8 U.S.C. § 1229b(a)(3).

If removed from the United States, an aggravated felon is permanently barred from seeking readmission to the country (absent a waiver), and is subject to increased punishment if he returns. *See* 8 U.S.C. §§ 1182(a)(9)(A)(ii), 1326(a)-(b) (increasing maximum sentence for illegal entry into the country from two to twenty years of imprisonment). If convicted of an

aggravated felony on or after November 29, 1990, an alien is categorically unable to demonstrate the "good moral character" required for naturalization. 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.10(b)(1)(ii). And because federal law automatically categorizes any aggravated felony as a "particularly serious crime," an aggravated felon is ineligible for asylum. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).

2. As the BIA recognized when it "chose[] [petitioner's case] as the vehicle for articulating [its] analytical approach to the 'recidivist possession' issue," App. 22a n.5, this case presents a highly suitable vehicle for resolving the proper treatment of an alien convicted of simple possession without any finding of a prior conviction. Petitioner properly raised and preserved in his immigration proceedings and in the court of appeals his request for cancellation of removal, as well as his objection to the IJ's conclusion that he has been convicted of a drug-trafficking aggravated felony. *See* App., *infra*, at 1a, 13a. Moreover, the en banc majority in the BIA and the concurring opinion thoroughly review and assess the competing arguments on both sides of the conflict.

This case also presents in especially stark relief the substantial implications of the question presented for an alien designated as an "aggravated felon." Petitioner came to the United States at a very young age, after which he became a lawful permanent resident and worked as a carpet installer since reaching seventeen years of age. His fiancée is a United States citizen, with whom he has four children who are also United States citizens.

Petitioner was removed from the country and separated from his family based on his conviction for possessing one tablet of Xanax without a prescription. Although the prosecutor exercised discretion to forgo charging petitioner as a recidivist based on his prior conviction for possessing a small quantity of marijuana, the court of appeals' approach effectively overrides that exercise of prosecutorial discretion and treats petitioner as an "aggravated felon" on the theory that he could have been prosecuted as a recidivist. The contrary view adopted by a majority of circuits would enable petitioner to seek relief that would allow him to live in the United States with his family.

C. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER HAS BEEN "CONVICTED" OF AN "AGGRAVATED FELONY"

The court of appeals in this case held that petitioner's conviction for simple possession of Xanax without a prescription subjected him to mandatory removal from the country because, even though simple drug possession is a misdemeanor under federal law, 21 U.S.C. § 844, petitioner could have been prosecuted for recidivist possession—a federal felony. *Id.* That holding cannot be squared with the text of the INA or with the other relevant sources of statutory interpretation.

1. As relevant here, the INA subjects to mandatory deportation a person who "has . . . been convicted" of an "aggravated felony," *i.e.*, a "felony punishable under" the federal drug laws. 8 U.S.C. § 1229b(a)(3); 18 U.S.C. § 924(c)(2). A person "con-

victed" of simple possession "has been convicted" of an offense that is punishable under the federal drug laws as a misdemeanor, not a "felony." *See* 21 U.S.C. § 844(a). Such a person therefore remains eligible for cancellation of removal.

That is true regardless of whether that person *could have been* prosecuted for recidivist possession. For purposes of determining whether a person is subject to mandatory removal, the statute focuses on what a person in fact "has been convicted" of, not what a person could have been prosecuted for. *See Alsol*, 548 F.3d at 215 (INA requires "an actual conviction for an offense that proscribes conduct that is punishable as a federal felony, not a conviction that *could* have been obtained if it had been prosecuted"); *Rashid*, 531 F.3d at 445 (statutory question is "whether the crime that an individual was *actually convicted of* would be a felony under federal law," not "what federal crimes an individual could hypothetically have been charged with"); *Pacheco-Diaz*, 513 F.3d at 781 (Rovner, J., dissenting from denial of rehearing) (objecting to majority's focus on what an individual "could have been charged with in state court").

An examination of what would have happened to petitioner in an analogous federal law prosecution underscores the significance of the INA's requirement of an actual felony conviction. Under the federal drug laws, a person convicted of possession may be sentenced as a felon for recidivist possession only if the prosecutor files an information charging recidivism, and the court makes a finding that the person is a recidivist. 21 U.S.C. §§ 844(a), 851. Accordingly, if a federal prosecutor charged petitioner only

with simple possession and petitioner pleaded guilty only to that charge, petitioner would have been convicted of simple possession, a misdemeanor, not recidivist possession, a felony. In that event, petitioner could not be considered to have been convicted of the felony of recidivist possession simply because the federal prosecutor *could have* charged him as a recidivist. *See United States v. LaBonte*, 520 U.S. 751, 759-60 (1997) ("[F]or defendants who have received the notice under § 851(a)(1), . . . the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." (quoting 28 U.S.C. § 994(h))).

The same analysis applies to petitioner's state law conviction. The text of the INA draws no distinction between federal and state law convictions. Indeed, it expressly requires their parallel treatment. *See* 8 U.S.C. § 1101(a)(43) (applying the definition of aggravated felony to an offense "whether in violation of Federal or State law"). Petitioner, having been charged with and convicted of simple possession, remains eligible to seek cancellation of removal. He is not subject to mandatory deportation simply because he instead could have been prosecuted under state law for recidivist possession.

The DHS changed its position on the question presented in this case, evidently based on its implications for federal law convictions. Initially, the DHS took the position that a state conviction for simple possession constitutes an aggravated felony whenever an alien "has a criminal history that *could have* exposed him to felony treatment had he been prosecuted federally." App., *infra*, at 26a. But the

DHS changed its position after argument before the BIA, conceding that mandatory deportation requires an actual conviction for recidivist possession. The DHS did so apparently based on concerns that its initial position logically would result in "a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement." App., *infra*, 27a.

2. The INA's definition of "aggravated felony" as applied to drug crimes confirms that a state conviction for simple possession does not constitute an aggravated felony. With respect to drug offenses, the definition treats as an aggravated felony only "illicit *trafficking* in a controlled substance." 8 U.S.C. § 1101(a)(43)(B) (emphasis added). It then includes within that definition any "drug *trafficking* crime (as defined in section 924(c) of title 18)." *Id.* (emphasis added). Section 924(c) in turn defines a "drug trafficking crime" as, among other things, "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). As this Court emphasized in *Lopez*, the determination whether a state conviction for possession of a controlled substance constitutes a "felony punishable under" the federal drug laws must begin with a "commonsense conception of 'illicit trafficking,' the term ultimately being defined." 549 U.S. at 53. "[O]rdinarily[,] 'trafficking' means some sort of commercial dealing." *Id.* at 53-54 (citing Black's Law Dictionary 1534 (8th ed. 2004)). And "[c]ommerce . . . certainly [ ] is no element of simple possession." *Id.* at 54.

The Court in *Lopez* noted that certain possession offenses under the CSA are punishable as felonies, including recidivist possession. 549 U.S. at 54, 55 n.6. But the Court made clear that a departure from the ordinary meaning of trafficking to include a possession offense could be justified only by a "clear statutory command" that "coerce[d]" its inclusion. *Id.* at 55 n.6. Here, there is no "clear statutory command" that "coerces" the "inclusion" of a conviction for simple possession as an aggravated felony simply because it might have been prosecuted as recidivist possession instead. To the contrary, given the textual requirement of a felony "conviction," there is a clear statutory command that compels its exclusion.

3. The court of appeals' interpretation is not only inconsistent with statutory text; it would also undermine important policies advanced by Congress's felony conviction standard. Mandatory removal is an especially harsh sanction. That is especially true for lawful permanent residents like petitioner, who came to this country when four years old and established deep roots here thereafter. Nor are the consequences of a person's deportation felt by that person alone; they extend to persons like petitioner's children, who, under the court of appeals' decision, must either leave the country or be separated from their father. The requirement of a recidivist conviction ensures that a prosecutor has made a considered judgment that the defendant's conduct warrants a charge and conviction that automatically gives rise to those severe consequences. Had Congress made a potential felony charge rather than an actual felony conviction the predicate for mandatory removal, that

salutary protection against unwarranted removal would not exist.

Indeed, the approach adopted by the court of appeals stands fundamentally at odds with Congress's basic objectives in enacting 21 U.S.C. § 851. Prior to the enactment of Section 851, a prosecutor was required to advise the court whether a drug possession conviction was the offender's first or subsequent offense and then file an information "setting forth [any] prior convictions." *See United States v. Noland*, 495 F.2d 529, 530 (5th Cir. 1974), *see also* 26 U.S.C. § 7237(c)(2) (1964). The district court was then required to sentence the defendant as a recidivist unless the defendant could successfully prove that he had no prior conviction. *See* 26 U.S.C. § 7237(c)(2) (1964).

By enacting Section 851, Congress sought to make the penalty structure for drug offenses "more flexible." H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. To accomplish that goal, Congress provided that "[n]o person . . . shall be sentenced to increased punishment by reason of one or more prior convictions" unless the prosecutor files an information prior to trial or plea alleging those prior convictions. 21 U.S.C. § 851(a)(1). That statutory directive reflects Congress's view that prosecutors have the experience and judgment to determine when a recidivist charge is appropriate based on the defendant's "individual circumstances." *See* H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. By linking mandatory removal to an actual felony conviction, rather than a conceivable felony charge, Congress incorporated that same prosecutorial screen into the removal process.

The court of appeals' standard is inconsistent with the congressional determination reflected in Section 851. Under the court of appeals' standard, a prosecutor's charging decisions carry no weight; individuals like petitioner are treated as recidivist felons even when a prosecutor has expressly declined to charge them as such. And the system of careful and conscientious prosecutorial decision-making mandated by Congress is supplanted by a regime under which all persons convicted of simple possession who have prior drug convictions are treated as convicted of an aggravated felony. *See Alsol,* 548 F.3d at 217 (concluding that the standard adopted by the court below "intrude[s] on prosecutorial discretion to make charging decisions," and "undermines the State's ability to negotiate plea agreements").

The court of appeals' mandatory removal standard also undermines another significant feature of the recidivist conviction requirement—that the determination of recidivist possession must be made in a court of law in connection with proceedings concerning the conviction, rather than by an immigration judge. That protection is important. Under federal law, for example, a person charged with recidivist possession has an opportunity to contest the validity of a charged prior conviction. 21 U.S.C. § 851. If the prior conviction is invalid, a person may not be convicted of recidivist possession. *Id.* An immigration judge, by contrast, lacks authority to inquire into the validity of a prior conviction. *Alsol*, 548 F.3d at 217.

The court of appeals' interpretation therefore exposes a person convicted of simple possession to mandatory removal even if a prior drug conviction is

wholly invalid. That danger is a real one. "Many misdemeanor or lesser convictions involve indigent defendants whose convictions are processed under questionable circumstances and may be found invalid if challenged." *Rashid*, 531 F.3d at 447 (internal quotation marks omitted). By making a felony conviction the predicate for mandatory deportation, Congress avoided the palpable unfairness of requiring mandatory deportation based on a conviction that could have been successfully challenged in a prosecution for recidivist possession. *Alsol*, 548 F.3d at 217; *Rashid*, 531 F.3d at 446-47.

The text of the INA and the other relevant sources of statutory interpretation thus demonstrate that the court of appeals erred in its interpretation of the statute. To the extent that there is any ambiguity, however, the rule of lenity applied in deportation cases requires an interpretation that favors petitioner. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Under that rule, courts "[should] not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used" in a statute. *INS v. Errico*, 385 U.S. 214, 225 (1966). Because the question presented arises with respect to the maximum sentence available for the crime of illegal reentry, *see* 8 U.S.C. § 1326(b), the rule of lenity applied in criminal cases applies in this case as well. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Here, at the very least, the court of appeals' interpretation is not required by the narrowest possible meaning of the statute. The rule of lenity therefore requires its rejection.

4. In adopting its possible felony prosecution standard, the court of appeals did not address the INA's text or other relevant sources of statutory interpretation. Instead, it reached the conclusion that this Court in *Lopez* mandated its approach. In particular, the court viewed its interpretation to be required by the Court's holding that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under the federal law." 549 U.S. at 60. The court of appeals' reliance on *Lopez* was entirely misplaced.

The court of appeals erred in attempting to parse the language of a holding directed to a different issue—whether the state's denomination of an offense as a felony makes it an aggravated felony when the conduct proscribed by the offense is punishable only as misdemeanor under federal law. In any event, as the BIA and the Second and Sixth Circuits have correctly concluded, far from dictating the court of appeals' approach, *Lopez* supports the contrary approach. *See* App., *infra*, 26a; *Alsol,* 548 F.3d at 215; *Rashid,* 531 F.3d at 445-46. When a person is charged with and convicted of simple possession, the conduct proscribed by the offense is simple possession, a federal law misdemeanor. It is only when a prosecutor charges the defendant as a recidivist possessor, and the defendant is found to have been a recidivist possessor, that the conduct proscribed by the offense becomes recidivist possession, a federal felony. *Id.* The court of appeals accordingly erred in holding that petitioner's conviction for simple possession qualified as an aggravated felony simply be-

cause he could have been prosecuted for recidivist possession instead.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEALS OPINION

JOSE ANGEL CARACHURI-ROSENDO Petitioner
v.
ERIC H. HOLDER, JR., U S ATTORNEY GENERAL Respondent
No. 07-61006

United States Court of Appeals, Fifth Circuit.
May 29, 2009

Petition For Review of an Order of the United States Board of Immigration Appeals

Before JONES, Chief Judge, and KING and ELROD, Circuit Judges.

EDITH H. JONES, Chief Judge:

Jose Angel Carachuri-Rosendo appeals an *en banc* order of the Board of Immigration Appeals (BIA) holding that he is ineligible for cancellation of removal based on a recidivist state misdemeanor conviction for drug possession that could have been punished as a felony under the federal Controlled Substances Act. The repeat conviction was deemed an aggravated felony under the Immigration and Naturalization Act (INA). Because this holding is correct, we DENY Carachuri's petition for review.

I. Background

Carachuri was admitted to the United States in 1993 and became a lawful permanent resident. In 2004,

in a Texas court, he pled guilty to misdemeanor possession of marijuana and was sentenced to 20 days in jail. *See* TEX. HEALTH & SAFETY CODE § 481.121. A year later, he pled *nolo contendere,* also in Texas, to misdemeanor possession of Alprazolam (Xanax) and was sentenced to 10 days in jail. *See* TEX. HEALTH & SAFETY CODE § 481.117(b). He was not prosecuted under Texas law as a recidivist. *See* TEX. PENAL CODE § 12.43.

In October 2006, Carachuri received notice that he was removable for having "been convicted of a violation of ... any law ... of a State ... relating to a controlled substance." *See* 8 U.S.C. § 1227(a)(2)(B)(i). Carachuri applied for cancellation of removal[1], but an immigration judge ruled that Carachuri was ineligible because he had been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3) (preventing cancellation of removal for aliens convicted of aggravated felonies). Specifically, the judge ruled Carachuri had committed a "drug trafficking crime," an aggravated felony under the INA, 8 U.S.C. § 1101(a)(43)(B), which is defined by reference to 18 U.S.C. § 924(c)(2) as "any felony punishable under the Controlled Substances Act." Under the CSA, in turn, a misdemeanor possession offense-committed after the conviction for a prior misdemeanor possession offense is final-can be punished as a felony be-

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[1] The Attorney General may cancel removal if an alien who is inadmissible or deportable has resided in the United States continuously for at least seven years, has been a lawful permanent resident for five years, and has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a).

cause conviction requires a term of "not less than 15 days but not more than 2 years." 21 U.S.C. § 844(a); 18 U.S.C. § 3559(a) (defining a felony as any offense punishable by more than one year in prison). Because Carachuri's second state conviction could have been punished as a felony under the CSA, had he been prosecuted in federal court, he committed a "drug trafficking crime," making him ineligible for cancellation of removal.

Carachuri appealed to the BIA, which issued an *en banc* opinion. The BIA's preferred interpretation of 8 U.S.C. § 1101(a)(43)(B) would require that an alien's "status as a recidivist drug possessor must have been admitted or determined by a court or jury within the prosecution for the second drug crime." *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 391 (B.I.A.2007). In other words, the second possession offense, the BIA reasoned, must be prosecuted under a state recidivism law that corresponds to the federal recidivism law; immigration judges should not go outside the record of the second conviction to determine what, hypothetically, might have been prosecuted. *Id.* at 393. The BIA did not follow this reasoning, however, because it was bound by this court's decision in *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir.2005). There, we held, as the immigration judge did here, that a second state misdemeanor possession offense qualifies as an aggravated felony simply because it could have been prosecuted as a felony under federal law. *Id.* at 577. Accordingly, the BIA dismissed Carachuri's appeal, and Carachuri filed a timely petition for review.

II. Jurisdiction and Standard of Review

Although Carachuri has been deported, his removal does not render moot an otherwise valid petition for review of a removal order because he could pursue an application for cancellation of removal. *See Lopez v. Gonzales*, 549 U.S. 47, 52 n.2, 127 S.Ct. 625, 629 n.2 (2006). We are generally prohibited from reviewing removal orders for aliens who have committed an aggravated felony. *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 460-61 (5th Cir.2006) (citing 8 U.S.C. § 1252(a)(2)(C)). A statutory exception, however, confers jurisdiction to review constitutional or legal questions raised in removal petitions. *Id.* at 461 (citing 8 U.S.C. § 1252(a)(2)(D)). Carachuri's petition for review falls within this exception, and we review the BIA's resolution of legal claims *de novo*. *See id.*

III. Discussion

Carachuri, with amicus curiae, advances the BIA's preferred interpretation of 8 U.S.C. § 1101(a)(43)(B) as applied to his case. Unlike the BIA, he contends that this court's alternative holding in *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir.2005), and our intervening decision in *United States v. Cepeda-Rios*, 530 F.3d 333 (5th Cir.2008), do not control his case. They do.

In *Sanchez-Villalobos*, this court held, in a ruling since abrogated, that a single state drug possession conviction qualifies as an aggravated felony if the state crime is punishable under the CSA and it is punishable as a felony under state or federal law. 412 F.3d at 576. In an alternative, but still viable, holding this court also concluded that Sanchez's

state possession offense qualified as an aggravated felony because it was his second possession offense and, therefore, could have been punished as a felony under the CSA's recidivism provision. *Id.* As we have often recognized, alternative holdings are binding precedent, not dicta. E.g., *United States v. Wright*, 496 F.3d 371, 375 n.10 (5th Cir.2007).

The first holding was abrogated by the Supreme Court's opinion in *Lopez v. Gonzalez,* 549 U.S. 47, 127 S.Ct. 625 (2006), an immigration case. The Court rejected the argument that a *single* possession offense punished as a felony under state law, but as a misdemeanor under the CSA, qualifies as an aggravated felony. The Court was concerned that varying state criminal law classifications would frustrate the scheme Congress chose.[2] *Id.* at 58-59, 127 S.Ct. at 632-33. Recognizing this potential incongruity, the Court concluded that federal, not state law is determinative. It held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Id.* at 60, 127 S.Ct. at 633. *This procedure, which looks* to conduct proscribed by state law, not just the elements of the state law offense, and compares that conduct to federal law has been termed the "hypothetical approach."[3] *See, e.g., United States v. Cepeda-Rios,*

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[2] "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors if it meant courts to ignore it whenever a State chose to punish a given act more heavily." *Id.* at 58, 127 S.Ct. at 632-33.

[3] The hypothetical approach should not be confused with the modified categorical approach. Under our modified categorical approach, a court or immigration official may look at the record of conviction to determine under which subsection of a multi-

550 F.3d 333, 335 (5th Cir.2008) (per curiam); *United States v. Pacheco-Diaz*, 513 F.3d 776, 779 (7th Cir.2008) (per curiam) *denying rh'g* to 506 F.3d 545 (7th Cir.2007); *Behre v. Gonzales*, 464 F.3d 74, 80, 84 (1st Cir.2006).

Although *Lopez* abrogated *Sanchez-Villalobos* 's first holding, the alternative holding remained untouched. In *United States v. Cepeda-Rios*, 550 F.3d 333 (5th Cir.2008) (per curiam), we reaffirmed that *Lopez* is "consistent with our earlier 'hypothetical' approach in *Sanchez-Villalobos*," and determined that a second state possession offense that could have been punished as a felony under federal law qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *Id.* at 334-35. Consequently, Carachuri's case is controlled by the alternative holding in *Sanchez-Villalobos*, as unaltered by the Supreme Court in *Lopez*, and as reaffirmed in *Cepeda-Rios*.

Nevertheless, Carachuri argues that the hypothetical approach applied in both *Sanchez-Villalobos* and *Cepeda-Rios* contravenes our prior case law. This

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offense statute an alien was convicted. *See Larin-Ulloa v. Gonzales*, 462 F.3d 456, 464 (5th Cir.2006); *Omari v. Gonzales*, 419 F.3d 303, 308 (5th Cir.2005). Sometimes this court uses yet a different approach in sentencing contexts. *See United States v. Carbajal-Diaz*, 508 F.3d 804, 807-09 (5th Cir.2007) (explaining how the modified categorical approach differs for enumerated offenses and crime of violence sentencing enhancements). *Lopez* 's hypothetical approach does not involve looking at the record of conviction. It only means going beyond the state statute's elements to look at the hypothetical conduct a state statute proscribes. *See United States v. Pacheco-Diaz*, 513 F.3d 776, 778-779 (7th Cir.2008) (per curiam) *denying reh'g to* 506 F.3d 545 (7th Cir.2007).

court follows a categorical approach for immigration cases, under which "courts look to the text of the statute violated, not the underlying factual circumstances." *See Lopez-Elias v. Reno,* 209 F.3d 788, 791 (5th Cir.2000); *Martinez v. Mukasey,* 508 F.3d 255, 258 (5th Cir.2008) (per curiam).[4] Because the hypothetical approach departs from past precedent, Carachuri argues, *Sanchez-Villalobos* and *Cepeda-Rios* must be abandoned. *See Central Pines Land Co. v. United States,* 274 F.3d 881, 893 (5th Cir. 2001) ("[O]ne panel of this court may not overrule another.")

This argument is misplaced. We are not confined to the categorical approach in cases like Carachuri's because the Supreme Court in *Lopez* goes beyond the categorical approach. *Lopez,* 549 U.S. at 60, 127 S.Ct. at 633 (emphasis added) (ruling that if the *conduct* proscribed by state offense could have been prosecuted as a felony under the CSA, then the state conviction qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(B)); *see Pacheco-Diaz,* 513 F.3d at 779; *Rashid v. Mukasey,* 531 F.3d 438, 443 (6th Cir. 2008) ("The *Lopez* Court ... embraced the hypothetical federal-felony approach."). *Lopez* did not hold that courts or immigration officials should look to the alien's actual conduct as reflected in the record of conviction. But courts must look beyond the text of the state statute violated-a departure from the categorical approach, which confines courts to that text. *Pacheco-Diaz,* 513 F.3d at 779 ("Looking at the conduct reflected in the state convictions, as opposed to the precise state crime charged, is the

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[4] The modified categorical approach described in note 3 is an exception to the categorical approach and is not at issue here.

only way to implement the hypothetical-federal-felony view that *Lopez* adopted as its holding.").

The hypothetical approach in *Sanchez-Villalobos* and *Cepada-Rios* moves incrementally, and justifiably, from the Supreme Court's holding in *Lopez,* which involved only one state possession conviction. Under this court's approach for successive state possession convictions, a court or an immigration official characterizes the conduct proscribed in the latest conviction, by referring back to the conduct proscribed by a prior conviction as well.[5] In *Cepeda-Rios,* we ruled this procedure was supported by *Lopez* 's holding that federal law should control; by its reasoning, which expressed concern that differences among state laws will frustrate federal classifications; and by its footnote, which expressly recognized that federal statutes referring to illicit drug "trafficking" are "counterintuitively" defined to include recidivist possession offenses. *Cepeda-Rios,* 530 F.3d at 335.[6] Be-

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[5] Although this court has already chosen sides, we note a circuit split regarding how the hypothetical approach applies when the alien has two state possession convictions. The Seventh Circuit agrees with this court's approach. *See Fernandez v. Mukasey,* 544 F.3d 862 (7th Cir.2008); *United States v. Pacheco-Diaz,* 506 F.3d 545 (7th Cir.2007)*reh'g denied,* 513 F.3d 776 (7th Cir.2008) (per curiam). But the First, Second, Third, and Sixth Circuits have adopted the approach the BIA advocated in its *en banc* opinion in this case, 24 I. & N. Dec. 382 (B.I.A.2007). *See Behre v. Gonzales,* 464 F.3d 74 (1st Cir.2006); *Alsol v. Mukasey,* 548 F.3d 207 (2d Cir.2008); *Gerbier v. Holmes,* 280 F.3d 297 (3d Cir.2002); *Rashid v. Mukasey,* 531 F.3d 438 (6th Cir.2008).

[6] *See Lopez,* 549 U.S. at 55 n.6, 127 S.Ct. at 630 n.6:

Of course, we must acknowledge that Congress did counterintuitively define some possession offenses as "illicit trafficking." Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2),

cause nothing in *Cepeda-Rios* squarely contradicts our prior cases, we may not disregard it.[7]

Carachuri, supported by amicus, also contends that criminal sentencing cases, like *Cepeda-Rios* and *Sanchez-Villalobos,* should not be applied in the immigration context, where the absence of criminal procedural safeguards denies aliens a fair opportunity to challenge their prior convictions. Accordingly, he reprises his argument that recidivism should be established at the prior state criminal proceeding, not by an immigration judge. This is not a textual argument, and the distinction it suggests has been repeatedly rejected. The statute analyzed in both sentencing and immigration cases is the same. *See* 8 U.S.C. § 1101(a)(43)(B); *United States v. Hernandez-Avalos,* 251 F.3d 505, 509 (5th Cir.2001). Further, *Lopez* explicitly recognized that a definition for the aggravated felony at issue here controls both

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such as possession of cocaine base and *recidivist possession, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2),* regardless of whether these federal possession felonies or their state counterparts constitute "illicit trafficking in a controlled substance" or "drug trafficking" as those terms are used in ordinary speech. But this coerced inclusion of a few possession offenses in the definition of "illicit trafficking" does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning. (emphasis added).

[7] Carachuri argues that lenity should apply, but lenity is only appropriate where "there is grievous ambiguity or uncertainty in the statute." *United States v. Salazar,* 542 F.3d 139, 147 (5th Cir.2008) (quoting *Muscarello v. United States,* 524 U.S. 125, 138-139, 118 S.Ct. 1911, 1919 (1998)). As we have interpreted the relevant statutory language, no such grievous ambiguity exists.

sentencing cases and the Attorney General's discretion to cancel removal. *Lopez*, 549 U.S. at 50-51, 127 S.Ct. at 628 (interpreting 8 U.S.C. § 1101(a)(43)(B)). This court is compelled to hold that "*Lopez* ineluctably applies with equal force to immigration and criminal cases." *United States v. Estrada-Mendoza*, 475 F.3d 258, 261 (5th Cir.2007) (per curiam); *see also Fernandez v. Mukasey*, 544 F.3d 862, 868 (7th Cir.2008); *United States v. Matamoros-Modesta*, 523 F.3d 260, 264-65 (4th Cir.2008); *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1216 (9th Cir.2007).

IV. Conclusion

For the foregoing reasons, Carachuri's petition for review is **DENIED**.

APPENDIX B

BOARD OF IMMIGRATION APPEALS OPINION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE JOSE ANGEL CARACHURI-ROSENDO, RESPONDENT

FILE A44 075 911 - HOUSTON

Decided December 13, 2007

(1) Decisional authority from the Supreme Court and the controlling Federal circuit court of appeals is determinative of whether a State drug offense constitutes an "aggravated felony" under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B) (2000), by virtue of its correspondence to the Federal felony offense of "recidivist possession," as defined by 21 U.S.C. § 844(a) (2000). *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002), followed.

(2) Controlling precedent of the United States Court of Appeals for the Fifth Circuit dictates that the respondent's Texas conviction for alprazolam possession qualifies as an "aggravated felony" conviction by virtue of the fact that the underlying alprazolam possession offense was committed after the respondent's prior State "conviction" for a "drug, narcotic, or chemical offense" became "final" within the meaning of 21 U.S.C. § 844(a).

(3) Absent controlling authority regarding the "recidivist possession" issue, an alien's State conviction for simple possession of a controlled substance will not be considered an aggravated felony conviction on the basis of recidivism unless the alien's status as a recidivist drug offender was either admitted by the alien or determined by a judge or jury in connection with a prosecution for that simple possession offense.

FOR RESPONDENT:
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Anne Chandler, Esquire,
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AMICUS CURIAE[1]:
Alina Das, Esquire,
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FOR THE DEPARTMENT OF HOMELAND SECURITY:

Rachel Silver,
Appellate Counsel;

Matthew Downer,
Appellate Counsel

BEFORE: Board En Banc: OSUNA, Acting Chairman; HOLMES, COLE, FILPPU, GRANT, and MILLER, Board Members. Concurring Opinion:

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[1] We acknowledge and appreciate the very helpful briefs submitted by the parties and by amicus curiae, representing the Immigrant Defense Project of the New York State Defenders Association.

PAULEY, Board Member, joined by HURWITZ, Acting Vice Chairman; Concurring Opinion: HESS, Board Member.

FILPPU, Board Member:

The respondent, a native and citizen of Mexico, appeals from an Immigration Judge's December 19, 2006, decision pretermitting his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2000). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent has two relevant convictions in Texas: (1) on October 28, 2004, for possessing 2 ounces or less of marijuana in violation of section 481.121 of the Texas Health & Safety Code; and (2) on November 15, 2005, for possessing less than 28 grams of alprazolam in violation of section 481.117(b) of the Texas Health & Safety Code. There is no dispute that these convictions make the respondent removable as an alien convicted of a violation of State law relating to a controlled substance. Section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2000). Thus, the only issue on appeal is whether the respondent qualifies for cancellation of removal.

The Immigration Judge found the respondent ineligible for cancellation of removal because he failed to demonstrate that he "has not been convicted of any aggravated felony," as required by section 240A(a)(3)

of the Act. Specifically, the Immigration Judge determined that the respondent's 2005 conviction for alprazolam possession was for an "aggravated felony" under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (2000), because it corresponded to the Federal felony of "recidivist possession" when considered in conjunction with his prior conviction for marijuana possession.

On appeal, the respondent challenges the Immigration Judge's determination that he stands convicted of an aggravated felony. The respondent and the DHS have each filed several appellate briefs, and an amicus curiae brief has been filed on the respondent's behalf. A three-member panel of the Board heard oral argument on July 12, 2007.

II. LEGAL BACKGROUND

Section 101(a)(43) of the Act defines the term "aggravated felony" to include a "drug trafficking crime" as defined in 18 U.S.C. § 924(c) (2000), "whether in violation of Federal or State law." In turn, 18 U.S.C. § 924(c)(2) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.)." The United States Supreme Court recently held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Lopez v. Gonzales*, 127 S. Ct. 625, 633 (2006). Thus, for a State drug offense to qualify as a "drug trafficking crime" and, by extension, an aggravated felony, it must correspond to an offense that carries a maximum term of imprisonment exceeding 1 year under

the Controlled Substances Act ("CSA"). *Id.* at 631 & n.7.

Most simple possession offenses proscribe conduct punishable as a Federal misdemeanor. However, as the Supreme Court recognized in a footnote in *Lopez v. Gonzales, supra*, the CSA does punish a few simple possession offenses with terms of imprisonment of more than 1 year, making them Federal felonies. *Id.* at 630 n.6. Specifically, the Court indicated that "[t]hose state possession crimes that correspond to felony violations of [the CSA], such as ... recidivist possession, clearly fall within the [aggravated felony definition], regardless of whether these federal possession felonies or their state counterparts constitute 'illicit trafficking in a controlled substance' or 'drug trafficking' as those terms are used in ordinary speech." *Id.* (citation omitted).

The statutory basis for the Supreme Court's discussion of "recidivist possession" as a Federal felony is provided by 21 U.S.C. § 844(a) (2000):

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance .... Any person who ... commits such offense after ... a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, ... shall be sentenced to a term of imprisonment for ... not more than 2 years ....

The language of 21 U.S.C. § 844(a) makes clear that a drug possession offense can be punished as "recidivist possession" only if it was committed after a prior drug conviction became final. Although the respondent does not dispute that his 2004 conviction for marijuana possession had become "final" prior to his

commission of alprazolam possession in 2005, he emphasizes that a Federal judge has no authority to impose a felony sentence on a recidivist under the CSA unless, prior to trial or plea, the prosecutor filed and served an "enhancement information" pursuant to 21 U.S.C. § 851(a) (2000), the purpose of which is to provide the defendant with notice and an opportunity to review allegations of previous convictions for accuracy, to contest the use of such convictions, to create a trial strategy, and to evaluate the consequences of a jury verdict. *United States v. Arnold,* 467 F.3d 880, 886-87 (5th Cir. 2006). Once such an information is filed, the defendant is entitled to a colloquy before the judge in which he must affirm or deny the existence or validity of the first conviction. 21 U.S.C. § 851(b).[2] If the defendant denies the facts upon which a recidivism charge is based, the burden is on the prosecution to prove those facts to the judge beyond a reasonable doubt. 21 U.S.C. § 851(c)(1). Furthermore, in some cases the defendant is allowed to challenge the validity of the first conviction without the necessity of lodging a formal collateral challenge in the convicting State. 21 U.S.C. §§ 851(c)(2), (e).

III. ISSUE

The issue is whether the respondent has been convicted of an offense that "proscribes conduct punishable as a felony" under the CSA within the meaning of *Lopez v. Gonzales, supra,* at 633, such that it may

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[2] To avoid needless confusion, this order refers to a repeat offender's prior and latter convictions as the "first" and "second," respectively, unless context dictates otherwise.

be considered a "drug trafficking crime" and, by extension, an "aggravated felony."

IV. DEFERENCE TO CIRCUIT LAW

Whether a particular State possession offense corresponds to the Federal felony of "recidivist possession" is a complicated question that involves the interplay of Federal and State criminal statutes. Our interpretation of criminal statutes is not entitled to deference; instead, we owe deference to the meaning of Federal criminal law as determined by the Supreme Court and the Federal circuit courts of appeals. *Matter of Yanez*, 23 I&N Dec. 390, 396-97 (BIA 2002). Moreover, this imperative of deference applies without regard to whether the court construed the statute in the immigration context or the criminal sentencing context, as long as the identical provision was at issue. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (explaining that, if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute even in immigration cases "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context").

At present, seven circuits have issued precedents deciding whether, and under what circumstances, a State offense of simple possession of a controlled substance qualifies as an aggravated felony based on its correspondence to the Federal felony of "recidivist possession." *See United States v. Pacheco-Diaz*, 506 F.3d 545, 548-49 (7th Cir. 2007); *Smith v. Gonzales*, 468 F.3d 272, 276-77 (5th Cir. 2006); *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006); *United States v. Palacios-Suarez*, 418 F.3d 692, 699-700 (6th Cir.

2005); *United States v. Sanchez-Villalobos,* 412 F.3d 572, 576-77 (5th Cir. 2005), *cert. denied,* 546 U.S. 1137 (2006); *Ferreira v. Ashcroft,* 382 F.3d 1045, 1050 (9th Cir. 2004); *United States v. Simpson,* 319 F.3d 81, 85-86 (2d Cir. 2002); *Gerbier v. Holmes,* 280 F.3d 297, 315-18 (3d Cir. 2002); *Steele v. Blackman,* 236 F.3d 130, 137-38 (3d Cir. 2001). These decisions do not reflect a consensus regarding the proper approach to "recidivist possession" offenses. Furthermore, all of the decisions, except for *United States v. Pacheco-Diaz, supra,* predate the Supreme Court's ruling in *Lopez v. Gonzales, supra.* Nevertheless, with the possible exception of *Ferreira v. Ashcroft, supra,*[3] these precedents may well be consistent with *Lopez v. Gonzales, supra,* such that they may need to be followed in removal proceedings, unless altered by the circuits in some respect.

V. EFFECT OF FIFTH CIRCUIT LAW

In *United States v. Sanchez-Villalobos, supra,* the Fifth Circuit-in whose jurisdiction these proceedings arise—held that an illegal reentry alien's 2001 Colorado conviction for codeine possession qualified as a valid factual predicate for an "aggravated felony" sentence enhancement because the underlying offense was a "felony" under both State *and Federal*

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[3] The Ninth Circuit holds that an adjudicator cannot consider recidivist sentencing enhancements when seeking to determine whether a State offense constitutes a drug trafficking aggravated felony. *Ferreira v. Ashcroft, supra,* at 1050. The rationale for this restrictive interpretation, which seems in tension with *Lopez v. Gonzales, supra,* at 631 n.6, is subject to a Supreme Court challenge in a context different from the one now before us. *United States v. Rodriquez,* 464 F.3d 1072 (9th Cir. 2006), *cert. granted,* 128 S. Ct. 33 (2007) (No. 06-1646).

law. Of particular relevance here is the court's determination that the Colorado offense was "considered a felony under federal law." *Id.* at 576. As the court explained,

> Sanchez-Villalobos was convicted for possession of marijuana in 1997. Because he was convicted of a prior drug possession offense, his subsequent Colorado conviction for possession of codeine in 2001 could have been punished under § 844(a) as a felony with a penalty of up to two years imprisonment.

Id. at 577 (citing *United States v. Simpson, supra,* at 85-86). Thus, the *Sanchez-Villalobos* court determined that the defendant's codeine possession offense was, to use the Supreme Court's terminology, "a state offense [that] proscribes conduct punishable as a felony" under the CSA. *Lopez v. Gonzales, supra,* at 633.

The *other* holding in *Sanchez-Villalobos*, i.e., that the codeine possession offense was an aggravated felony simply by virtue of its "felony" classification under State law, was plainly superseded by *Lopez v. Gonzales, supra,* which held that such State classifications are irrelevant. It is equally plain, however, that *Lopez v. Gonzales, supra,* did not reject the "federal felony" rationale adopted in the alternate holding of *Sanchez-Villalobos*, discussed above. On the contrary, that rationale is reconcilable with the Supreme Court's treatment of "recidivist possession" as an offense that corresponds to some "state possession crimes." *Lopez v. Gonzales, supra,* at 631 n.6.

We consider the alternate holding of *Sanchez-Villalobos* to be controlling here for two reasons. First, that holding is not explicitly foreclosed by *Lo-*

pez v. Gonzales, supra. And second, it did not require that the Colorado conviction have been entered in a proceeding that complied with the procedural requirements for Federal recidivist treatment in order for the underlying offense to be "considered a felony under federal law." *United States v. Sanchez-Villalobos, supra,* at 576. In accordance with *Sanchez-Villalobos*, then, we hold that the respondent's 2005 Texas conviction for alprazolam possession was for an offense that is "considered a felony under federal law," thereby qualifying it as an aggravated felony in the Fifth Circuit. *Id.*

Both parties urge us to resolve the issues presented on appeal in accordance with our own judgment, but we cannot simply overlook the fact that *Sanchez-Villalobos* is a precedent decision of the controlling circuit that has been neither overruled nor shown to be meaningfully distinguishable from the present case. Board Member Pauley's concurring opinion points to a footnote in *Smith v. Gonzales, supra,* to support its view that *Sanchez-Villalobos* has been deprived of its precedential value, yet the footnote in question merely observes that "the effect of ... *Sanchez-Villalobos* is uncertain" with respect to the recidivist possession issue. *Smith v. Gonzales, supra,* at 276 n.3. Even after *Lopez* and *Smith*, moreover, the criminal law courts within the Fifth Circuit have continued to rely on *Sanchez-Villalobos* as controlling precedent on the recidivist possession question. Indeed, the Fifth Circuit itself recently affirmed a district court decision that relied on *Sanchez-Villalobos* to reject many of the same arguments advanced by the present respondent. *United States v. Castro-Coello,* 474 F. Supp. 2d 853, 859-62 (S.D. Tex. 2007), *aff'd sub nom. United States v. Molina-*

Gonzales, 234 Fed. Appx. 319 (5th Cir., July 17, 2007) (No. 07-40279) (per curiam); *see also United States v. Lopez-Molina*, 494 F. Supp. 2d 517, 521-22 (W.D. Tex. 2007); *United States v. Rodriguez-De Leon*, 492 F. Supp. 2d 677, 680-82 (W.D. Tex. 2007).

The courts of criminal jurisdiction within the Fifth Circuit presently treat *Sanchez-Villalobos* as controlling on the recidivist possession issue, and we see no ground for departing from that view. Absent an en banc decision, even Fifth Circuit judges cannot overrule prior panel decisions unless "'such overruling is unequivocally directed by controlling Supreme Court precedent.'" *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (quoting *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir. 1991)). It is certainly reasonable to believe that the Fifth Circuit may want to reexamine its law in the wake of *Lopez v. Gonzales*. Indeed, as we explain below, we believe *Lopez* points strongly toward a different construction of the statute in "recidivist possession" cases. But it is not for this Board to declare that Fifth Circuit precedent has been implicitly overruled by the Supreme Court. If Fifth Circuit law needs to be refined in light *of Lopez*, then the Fifth Circuit should be the one to refine it.[4]

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[4] Immigration Judges conducting removal proceedings within a circuit that has already spoken on the "recidivist possession" issue must make judgments that faithfully adhere to those decisions, absent superseding Supreme Court precedent. To illustrate, our decision in *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002), was superseded by the Supreme Court's decision in *Lopez v. Gonzales, supra*. Furthermore, our decision in *Matter of Elgendi*, 23 I&N Dec. 515 (BIA 2002), was superseded by the Second Circuit's subsequent decision in *United States v. Simpson, supra*.

VI. RECIDIVIST POSSESSION CASES NOT GOVERNED BY CIRCUIT LAW

Although we consider *United States v. Sanchez-Villalobos, supra,* to control this case, we acknowledge that *Lopez v. Gonzales, supra,* may require a reexamination of prior circuit law, including Fifth Circuit law. The "recidivist possession" issue is also important in general, and we strive for as consistent a nationwide application of the immigration laws as possible. We shall therefore explain how to resolve cases involving aliens alleged to have State offenses corresponding to "recidivist possession" in the absence of controlling circuit law.[5]

A. Ambiguity of the Statute as to Recidivist Possession Cases

We must decide whether a State simple possession offense that might have been subject to a Federal felony recidivist prosecution qualifies as a "felony punishable under the [CSA]" within the meaning of 18 U.S.C. § 924(c)(2). Although *Lopez v. Gonzales, supra*, went far to explain the meaning of this statu-

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[5] Because Fifth Circuit precedent is dispositive of this appeal, the present discussion is in the nature of guidance rather than a formal holding. We have chosen this appeal as the vehicle for articulating our analytical approach to the "recidivist possession" issue because the parties and amicus have exhaustively developed the question in their briefs and at oral argument. Moreover, the analytical approach we adopt today is applied as the holding of *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007), which we publish simultaneously with the present decision.

tory language, significant ambiguities persist in the "recidivist possession" context.

The statutory question is complicated because "recidivist possession" is not a discrete offense under Federal law. A criminal "offense" is defined by its "elements," *Schmuck v. United States,* 489 U.S. 705, 716-17 (1989), with "elements" being understood as facts that must be proven to a jury beyond a reasonable doubt in order to convict. *In re Winship*, 397 U.S. 358, 364 (1970). Yet "recidivist possession" is not defined in relation to "elements." Instead, it is an amalgam of elements, substantive sentencing factors, and procedural safeguards, many of which need never have been submitted to a jury. Specifically, although 21 U.S.C. § 844(a) defines simple possession by reference to several formal statutory elements, facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as "elements" in the traditional sense. *Almendarez-Torres v. United States*, 523 U.S. 224, 228-35 (1998). Furthermore, 21 U.S.C. § 851 precludes a Federal judge from enhancing a drug offender's sentence on the basis of recidivism absent compliance with a number of safeguards that, among other things, serve to protect the right of the accused to notice and an opportunity to be heard as to the propriety of an increased punishment based on prior convictions.

An additional issue affecting the interpretation of the statute arises from the fact that determinations respecting "drug trafficking crime" convictions are subject to the "categorical approach." *See, e.g., Sandoval-Lua v. Gonzales,* 499 F.3d 1121, 1127-28 (9th Cir. 2007); *Batrez Gradiz v. Gonzales,* 490 F.3d 1206, 1210-11 (10th Cir. 2007). This means that any

correspondence between a State possession "conviction" and the Federal felony of "recidivist possession" must presumptively be determined by reference to the statutory definition of the State offense or, where that offense is "divisible," by reference to admissible portions of the "conviction record" showing which prong of the divisible statute led to the particular conviction. *Gonzales v. Duenas-Alvarez,* 127 S. Ct. 815 (2007) (discussing the categorical approach as applied to aggravated felony determinations under the immigration law); *see also Shepard v. United-States,* 544 U.S. 13 (2005); *Taylor v. United States,* 495 U.S. 575 (1990). Yet because "recidivist possession" consists in large part of "nonelement" facts, it is not clear how the categorical approach should be applied. *See, e.g., Shepard v. United States, supra,* at 19 (stating that "the categorical approach ... refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes").[6]

Hence, there are a variety of uncertainties over how to apply the statute in "recidivist possession" cases, and we find the statute ambiguous on this question.

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[6] The nonelement facts pertaining to recidivist possession are aspects of Federal criminal law itself. They are not directly part of the immigration statute. As such, they are not easily characterized as "limiting" or "aggravating" factors within the "aggravated felony" definition, such that the statute readily contemplates their being determined in the first instance by an Immigration Judge in removal proceedings. *Cf. Matter of Babaisakov,* 24 I&N Dec. 306 (BIA 2007) (allowing an Immigration Judge to assess nonelement facts about a crime independently when the *removal statute* does not require the fact to have been part of the "conviction" itself).

B. Interpretation of the Board

We resolve the ambiguities in the statute primarily by looking to the reasoning and holding of the Supreme Court in *Lopez v. Gonzales, supra,* to the particular arguments of the parties, and to the minimum requirements for imposing recidivist punishments in criminal cases. We are also influenced by the problems in having a "recidivist offense" be identified for the first time in removal proceedings simply by virtue of an alien's overall criminal history, as opposed to being determined during the criminal prosecution for the alleged recidivist conviction itself.

In *Lopez v. Gonzales, supra*, the Supreme Court explained that the language of section 101(a)(43)(B) and 18 U.S.C. § 924(c)(2) applies primarily to offenses that involve "trafficking" in controlled substances. As the Court emphasized, construing "trafficking" to encompass simple possession is "incoheren[t] with any commonsense conception" of the term's ordinary meaning and is to be resisted in the absence of a clear congressional directive to the contrary. *Lopez v. Gonzales, supra,* at 629-30. And while the Court acknowledged in a footnote that "Congress did counterintuitively define some simple possession offenses as 'illicit trafficking'" by classifying them as "felonies" under the CSA, it described the inclusion of such offenses as "coerced." *Id.* at 630 n.6. In our view, all that can reasonably be discerned from this footnote is that 21 U.S.C. § 844(a) defines "recidivist possession" as "an offense," constituting a "felony violation" of the Federal drug laws,

that "corresponds" to some "state possession crimes." *Id.*

The most important lessons of *Lopez v. Gonzales, supra,* are the concern for *actual* drug trafficking embodied in section 101(a)(43)(B) of the Act, and the Court's specific holding that a State offense can be an aggravated felony drug trafficking crime "only if it proscribes conduct punishable as a felony under" Federal law. *Id.* at 633. In light of these dictates, we find it inappropriate to treat a series of misdemeanor possession offenses as "trafficking" felonies unless we are confident that the State offense corresponds in a meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism.

The DHS initially argued that any correspondence between a "state possession crime" and the Federal felony of "recidivist possession" could be established by means of a purely *hypothetical* inquiry, in which the question is not whether the respondent was convicted of "a state offense [that] proscribes conduct punishable as a felony" under the CSA, but rather whether he has a criminal history that *could have* exposed him to felony treatment had he been prosecuted federally. The concurring opinion authored by Board Member Pauley continues to espouse this approach; however, the DHS modified its position after oral argument and now concedes that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to "recidivist possession" unless the State actually used those laws to prosecute the respondent. The DHS has offered little more than a hint as to why it "clari-

fied" its position in this manner. But it seems that the DHS is troubled by the fact that a purely hypothetical approach, carried to its logical conclusion, could result in a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement. As the DHS now appears to acknowledge, it would likewise be anomalous to treat a second State conviction for simple possession as the hypothetical equivalent of a Federal "recidivist possession" conviction when the State affirmatively elected not to proceed under its own available recidivism laws.

The parties have not identified any State that prosecutes recidivist offenses in a manner that exactly parallels the CSA's recidivist requirements. Still, it appears that most, if not all, States have laws that authorize increased punishment for repeat offenders. Some States have recidivism laws that are focused directly and exclusively on drug crimes, others have general recidivism laws that encompass both drug crimes and nondrug crimes, still others have both, while a few may have neither. Importantly, however, all State recidivism prosecutions must correspond to the CSA's treatment of recidivism by providing the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper. *Oyler v. Boles,* 368 U.S. 448, 452-53 (1962). In our view, these minimal requirements governing findings of recidivism are part and parcel of what it means for a crime to be a "recidivist" offense. Hence, we conclude—absent circuit law to the contrary—that a State conviction cannot "proscribe conduct punishable as" recidivist possession unless the State

successfully sought to impose punishment for a recidivist drug conviction.

This means that the respondent's status as a recidivist drug possessor must have been admitted or determined by a court or jury within the prosecution for the second drug crime. It is not necessary, however, for the *structure* of the underlying State law to be comparable to the structure of the CSA. *Lopez v. Gonzales, supra,* requires a focus on a counterpart "offense," not a counterpart law. Thus, it is our understanding that a conviction under a particular State's *general* recidivist statute may correspond to "recidivist possession" under the CSA, provided the relevant prior conviction was for a drug offense that had become "final" as of the date when the second offense was committed.[7]

The record does not reflect that the present respondent was determined to be punishable in Texas because he was a recidivist drug possessor. This issue was neither litigated by the parties nor determined by the court in connection with his 2005 conviction for alprazolam possession. Thus, were we not constrained by Fifth Circuit law to hold otherwise, we would conclude that the respondent has not been

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[7] Any State with no available recidivism law, in our judgment, would be similar to a State that lacks laws criminalizing "possession with intent to distribute." *See Lopez v. Gonzales, supra,* at 633 (acknowledging that "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount," despite the fact that the amount of drugs possessed could have led to a Federal felony prosecution under 21 U.S.C. § 841(a) for "possession with intent to distribute").

convicted of an aggravated felony that precludes him from applying for cancellation of removal.

Our approach differs from that of the Seventh Circuit in *United States v. Pacheco-Diaz, supra,* the only precedential circuit court decision that has addressed "recidivist possession" after *Lopez v. Gonzales* was decided. In that case, the Seventh Circuit treated a criminal defendant's second Illinois conviction for marijuana possession as an aggravated felony conviction for sentence enhancement purposes because "he would have been eligible for a recidivist enhancement under section 844(a)" had he been prosecuted federally. *United States v. Pacheco-Diaz, supra,* at 550. The Seventh Circuit's approach is essentially identical to that taken by the Second and Fifth Circuits in *United States v. Simpson, supra,* and *United States v. Sanchez-Villalobos, supra,* respectively. Yet none of these courts addressed or resolved the more intricate set of issues raised by the parties here, bearing on how a State drug possession offense may equate to the Federal "offense" of recidivist possession when the Federal offense itself is compounded out of a disparate collection of elements, substantive sentencing facts, and procedural safeguards within the CSA.

We believe the question whether a second State drug possession offense "proscribes conduct punishable" as a Federal recidivist felony presents a broader set of issues than were presented in *Pacheco-Diaz.* Federal recidivist felony treatment hinges not simply on potential punishment; it requires the actual invocation by a Federal prosecutor of the recidivist enhancement features of Federal law. Indeed, the DHS acknowledges that a State possession offense cannot

correspond to a Federal recidivist felony unless the State prosecutor actually invoked the available recidivist enhancement provisions of State law. We thus understand the *Lopez* Court's allusion to a "correspondence" between a "state possession crime" and "recidivist possession" as requiring a comparison between the *particular State offense* that is alleged to be an aggravated felony and the Federal offense of recidivist possession.

Yet the purely "hypothetical" approach embraced by the Second, Fifth, and Seventh Circuits (as well as the concurring Board Members) discounts the importance of the respondent's actual offense—in this case, his 2005 alprazolam possession offense—in favor of an expansive, and apparently noncategorical, inquiry into his larger criminal history. In essence, the hypothetical approach would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be "an offense" that could have been prosecuted as a Federal felony.[8]

In our view, however, the proper question is not whether the respondent's personal circumstances make him the type of person who could have been

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[8] Aliens in removal proceedings have no constitutional right to appointed counsel, so allowing facts about recidivism to be determined by an Immigration Judge in the first instance could raise due process concerns. *Chewning v. Cunningham*, 368 U.S. 443, 447 (1962) (finding that due process requires the appointment of counsel to a defendant charged as an habitual offender under Virginia law in light of the complexity of the recidivism issue).

prosecuted as a Federal felon, but rather whether he has a State "conviction" for an offense that "proscribes conduct punishable as a felony under" Federal law. *Lopez v. Gonzales, supra,* at 633. Without a showing of recidivism within the confines of the State prosecution, we conclude that the State offense cannot be said to proscribe conduct punishable as a felony under Federal law. Thus, although *United States v. Pacheco-Diaz, supra,* is binding precedent in removal proceedings arising within the Seventh Circuit, we decline to follow it elsewhere.[9]

VII. CONCLUSION

In conclusion, whether a State simple possession offense corresponds to the Federal felony of "recidivist possession" is a question that must be determined by reference to the controlling precedents of the Supreme Court and the Federal circuit courts of ap-

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[9] We also disagree with Board Member Pauley's contention *that Lopez v. Gonzales, supra,* prescribes a methodology for determining which State possession offenses correspond to "recidivist possession." The concurrence merely draws a series of inferences from the Court's brief discussion of "recidivist possession" and does its best to weave them into a complete tapestry, but in our view this tapestry is not of the Supreme Court's making. Board Member Pauley's concurrence also asserts that a State conviction must be capable of corresponding to a Federal recidivist conviction even if we assume that no State had any recidivist statute. But such an assumption is contrary to the existing body of State law, as the Supreme Court was well aware when it wrote footnote 6 in *Lopez v. Gonzales, supra. See Almendarez-Lorres v. United States, supra,* at 243 (quoting *Parke v. Raley,* 506 U.S. 20, 26 (1992), for the proposition that "[r]ecidivism laws 'have a long tradition in this country that dates back to colonial times' and currently are in effect in all 50 States").

peals. However, absent controlling authority regarding the "recidivist possession" issue, an alien's State conviction for simple possession of a controlled substance will not be considered an aggravated felony conviction on the basis of recidivism unless the alien's status as a recidivist drug offender was either admitted by the alien or determined by a judge or jury in connection with a prosecution for that simple possession offense.[10]

The present respondent's alprazolam possession offense corresponds to the Federal felony offense of "recidivist possession" within the meaning of applicable Fifth Circuit law because he admits that he committed that offense after a prior drug conviction had become final. Fifth Circuit law does not now require that the recidivism question be determined against the respondent in the underlying State proceedings. Accordingly, subject to material changes in Fifth Circuit law, the respondent's 2005 conviction was for a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c)(2) and, by extension, an aggravated felony under section 101(a)(43)(B) of the Act that renders him ineligible for cancellation of

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[10] We do not now decide whether State criminal procedures must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with 21 U.S.C. § 851(c). *See Steele v. Blackman, supra.* Nor are we now concerned with the timing of notice, or with the burdens and standards of proof applicable to a defendant's challenge to his status as a recidivist. We also reserve the question whether facts about the nature, timing, or finality of prior convictions must be established categorically or otherwise.

removal. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

CONCURRING OPINION Roger A. Pauley, Board Member, in which Gerald S. Hurwitz, Acting Vice Chairman, joined

This case requires us to decide whether, in light of the Supreme Court's decision in *Lopez v. Gonzales,* 127 S. Ct. 625 (2006) (holding that a State drug offense constitutes a "felony punishable under the Controlled Substances Act" only if it proscribes conduct punishable as a felony under that Federal law), a second or subsequent State conviction for possessing a controlled substance is an aggravated felony "drug trafficking crime" conviction under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B) (2000), notwithstanding that the State conviction was not rendered under circumstances in which the defendant alien was given pretrial notice that he or she was being charged with recidivist drug possession and afforded the right to challenge any such prior charged conviction, as required for Federal recidivist drug possession convictions under 21 U.S.C. § 844(a) (2000), by virtue of the provisions of 21 U.S.C. § 851 (2000) (entitled "Proceedings to establish prior convictions"). After the *Lopez* decision, the United States Court of Appeals for the Seventh Circuit resolved this issue in *United States v. Pacheco-Diaz,* 506 F.3d 545 (7th Cir. 2007), in a manner consistent with the views set forth in this concurrence, although evidently without considering the particular arguments raised by the

parties here regarding 21 U.S.C. § 851. Thus, as noted by the majority, we are in the position of having to address some of the issues presented essentially as a matter of first impression, well aware that our disposition will not be entitled to the deference accorded when we interpret ambiguous statutes within the area of our expertise. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005).

I. LEGAL BACKGROUND

Since our ultimate task is to divine the meaning of section 101(a)(43)(B) of the Act as applied to the State recidivism drug possession scenario, with the aid of any guideposts we may discern in *Lopez v. Gonzales, supra*, it is helpful before attempting to do so to set forth the crucial language in *Lopez* that bears on this matter as well as the relevant statutes and other judicial decisions that comprise the legal landscape to be traversed.

Section 101(a)(43) (containing a definition, with several lettered branches, of the term "aggravated felony") states in its penultimate sentence that the "term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years."

Section 101(a)(43)(B) defines as an aggravated felony "illicit trafficking in a controlled substance ... including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." We are not concerned here with the "illicit trafficking" prong of

the definition, which we have determined is confined to any unlawful trading or dealing in a controlled substance. *E.g., Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992) (finding that simple possession offenses are not within the concept of "illicit trafficking"); *see also Kuhali v. Reno,* 266 F.3d 93 (2d Cir. 2001) (approving the definition of "trafficking" in *Matter of Davis).* The referenced definition at 18 U.S.C. § 924(c) states that the term "drug trafficking crime" means "any felony punishable under the Controlled Substances Act [as well as under two other Federal drug statutes]."

In pertinent part, 21 U.S.C. § 844(a) provides as follows:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance .... Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year ... except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years ....

It is not disputed by the respondent in this case that he has a prior controlled substance conviction or that the requisite "finality" requirements for felony recidivist status of the respondent's second State drug possession offense have been met. Therefore, the sole question before us is whether that second offense is properly treated as a felony considering the fact that, if the offense had been prosecuted federally, in order for the defendant to be sentenced to the

increased penalty authorized under 21 U.S.C. § 844(a), the Government would have had to comply with 21 U.S.C. § 851, which requires that a pretrial information be filed alleging the prior conviction and permitting the defendant to challenge whether he has been convicted thereunder (i.e., whether he is the person against whom the conviction was rendered) and to collaterally attack the validity of the prior conviction on constitutional grounds.[1]

In *Lopez v. Gonzales, supra,* the Supreme Court resolved a split in the courts of appeals by holding that a State offense constitutes a "felony punishable under the Controlled Substances Act" only if it proscribes conduct punishable as a felony under that statute, notwithstanding that the offense was punishable as a felony under State law. Hence, the Court concluded, a single State felony offense of simple possession is not an aggravated felony inasmuch as, under the Federal counterpart provision of the Controlled Substances Act, 21 U.S.C. § 844(a), such an offense would be only a misdemeanor. In so doing, the Court rejected the view of the majority of courts of appeals, including that of the Fifth Circuit in which this case arises, that had held that a controlled substance offense qualified as a "drug trafficking crime" aggravated felony if the State graded the offense as a felony. Instead, the Court adopted the approach of a minority of circuits, sometimes referred to as the "hypothetical Federal felony" approach, in which a court examines the elements of

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[1] The statute contains a limitation, not applicable here, restricting the ability to challenge the validity of the conviction to only those prior convictions entered within 5 years of the filing of the information.

the controlled substance offense as charged by the State and compares that offense to those enumerated in the Controlled Substances Act (and the other two referenced Federal drug statutes) to see whether, if federally prosecuted under such a corresponding statute, the State offense would be a felony (i.e., an offense punishable by more than 1 year in prison).

However, of critical importance to the instant case, the Court observed in *Lopez v. Gonzales, supra,* that even though the felony/misdemeanor distinction in the Controlled Substances Act appeared to be aimed primarily at identifying for felony treatment those controlled substances offenses that have a trafficking aspect, nevertheless,

> we must acknowledge that Congress did counterintuitively define some possession offenses as 'illicit trafficking.' Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c), such as ... recidivist possession, *see* 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c), regardless of whether these federal possession felonies or their state counterparts constitute 'illicit trafficking in a controlled substance' or 'drug trafficking' as those terms are used in ordinary speech."

Lopez v. Gonzales, supra, at 630 n.6. With the foregoing as backdrop, the complex issues presented by this case are addressed below.

II. ANALYSIS

A. Whether Fifth Circuit Case Law Is Controlling

Before addressing the merits, there is a threshold question, namely whether the issue at hand is controlled by case law issued prior to *Lopez v. Gonzales, supra,* in the Fifth Circuit, which the majority find dictates the outcome here and requires us to find that the respondent's second State drug possession offense is an aggravated felony. *See United States v. Sanchez-Villalobos,* 412 F.3d 572, 576-77 (5th Cir. 2005). We conclude otherwise.

The majority read *United States v. Sanchez-Villalobos, supra,* as containing an alternative holding that binds the Board, pursuant to our established precedents indicating that we adhere to a court of appeals interpretation of what constitutes an aggravated felony. While such a reading of *Sanchez-Villalobos*, considered alone, is not unreasonable, we believe that, in this situation, that case does not govern the outcome such that the Board is prohibited from independently resolving the issue.[2] Not only is the characterization of *Sanchez-Villalobos* as embodying an alternative holding undermined by a subsequent Fifth Circuit decision, the Supreme Court's intervening ruling in *Lopez* rejected the very methodology for making a "drug trafficking crime" aggravating felony determination that the *Sanchez-Villalobos* court employed in its principal holding.

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[2] Were *Sanchez-Villalobos* a clearly still viable holding, the Board would be bound to follow it in cases arising within the jurisdiction of the Fifth Circuit, in light of our historic practice of following circuit precedent as to issues on which the Board is not entitled to deference. *See Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989).

We point out first that the Fifth Circuit has itself, before *Lopez*, cast substantial doubt on whether the statements in *Sanchez-Villalobos* concerning the two State drug possession question represent a holding as opposed to mere dicta. *Smith v. Gonzales,* 468 F.3d 272 (5th Cir. 2006). Therein, responding to the Government's argument that the holding in *Sanchez-Villalobos* supported its position, the court stated:

> It is far from certain that this is a correct interpretation of this opinion. In several opinions that preceded *Sanchez-Villalobos*, we arrived at our ultimate conclusion based on the law of the convicting jurisdiction, implying that the characterization of the conviction under the law of the convicting court controlled.
>
> The effect of Part B of *Sanchez-Villalobos* is uncertain. The conclusion of the panel in *Sanchez-Villalobos* that the state conviction was a felony is fully explainable by the conclusion reached in Part A of the decision that the conviction qualified as a felony because under state law the punishment for the offense exceeded one year.

Smith v. Gonzales, supra, at 276 n.3 (citations omitted).

Given this later decision, which serves to undercut the precedential import of *Sanchez-Villalobos*, we do not deem the Board constrained to follow that decision. Moreover, it would be odd to find that the Supreme Court, having eschewed the Fifth Circuit's interpretation of the core phrase "drug trafficking crime (as defined in section 924(c) of title 18)" as applied to nonrecidivist State drug possession offenses, the Fifth Circuit's alternative holding in *Sanchez-*

Villalobos as to recidivist such convictions (even if so regarded), which set forth little if any rationale, can be said to have survived intact and unaffected. Therefore, in light of both the intervening decisions in *Smith v. Gonzales* and *Lopez v. Gonzales,* we regard the slate as having been effectively wiped clean with respect to the two State drug possession issue in the Fifth Circuit, or the waters at least sufficiently muddied that the Board is not bound by our historic practice of adhering to circuit law.[3]

B. Merits of This Case

We shall first set forth our view, essentially in line with that of the Seventh Circuit in *United States v. Pacheco-Diaz, supra,* as to why the respondent's two State drug possession convictions constitute "drug trafficking crime" aggravated felony convictions under *Lopez v. Gonzales, supra.* But since much of the merits analysis consists of also showing why the competing arguments and positions of the parties and of the majority are flawed and cannot be squared with *Lopez*, we also address those arguments and positions later on and in some depth.

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[3] The majority opinion's noting of the fact that a panel of the Fifth Circuit affirmed in an unpublished, single word order a district court's holding that *Sanchez-Villalobos* was still controlling authority on the question is not sufficient to alter this conclusion. *See United States v. Castro-Coello,* 474 F. Supp. 2d 853 (S.D. Tex. 2007), *aff'd sub nom. United States v. Molina-Gonzales,* 234 Fed. Appx. 319 (5th Cir. July 17, 2007).

1. Position of the Concurring Opinion

Unlike the majority, we find that we are not at liberty to devise our own mode of analysis for answering the question presented by this case and conclude instead that *Lopez v. Gonzales* suggested the methodology to be employed. In *Lopez* the Court applied the hypothetical Federal felony approach[4] in the context of a State felony that would only be a Federal misdemeanor (because it was a simple possession offense). That same approach, however, logically mandates that a State illicit drug trafficking misdemeanor (and there are some)[5] would nonetheless be an aggravated felony because it would be a felony if federally prosecuted. Thus, the upshot of the approach adopted by the Court is that the penalty assigned by the State to a drug offense is irrelevant; it is the *hypothetical Federal penalty* that could be applied that counts for "drug trafficking crime" aggravated felony purposes.

Put another way, the Court in *Lopez* implicitly recognized that whether or not a State prosecuted a controlled substance offense as a misdemeanor or felony (such as would result from the application of its recidivism law if it had one) is irrelevant. Following that principle, we are of the view that under *Lo-*

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[4] We recognize that the *Lopez* opinion never used the phrase "hypothetical Federal felony" and instead referred to an "analogous" Federal felony, quoting from our decision in *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990). *See Lopez v. Gonzales*, *supra*, at 632 n.8. The two terms are, however, identical in substance and we prefer the more descriptive phrase "hypothetical Federal felony."

[5] *E.g.*, N.Y. Penal Law § 221.40 (McKinney 2007)

pez the result in this and similar cases would not change even if one were to assume, arguendo, that no State had a recidivist statute, general or specific, applicable to drug offenses. Even if all State drug offenses, including those committed after a first such conviction became final, remained subject to the same State penalties as for a one-time violation under State law, under *Lopez* that is neither here nor there since the dispositive issue under the Court's approach is whether a second drug possession offense *could be* a felony if federally prosecuted.

If the absence of a State's recidivism statute is thus irrelevant to a *Lopez* analysis for purposes of 21 U.S.C. § 844(a)'s felony offense involving recidivist possession, then it follows that whether or not a State applies a recidivism statute, or has a procedural statute like that in 21 U.S.C. § 851, is likewise irrelevant. Such a latter-type statute presumes the existence of a recidivist enhancement (i.e., § 851 requires that notice be given of intent to charge the defendant as a recidivist and then gives the defendant certain rights vis-a-vis the prior conviction).[6] In short, the hypothetical Federal felony approach adopted in *Lopez* appears to mean that a second State drug possession offense, whether denominated as a misdemeanor or felony under State law (whether or not as a result of the application of a State recidivism provision), is an aggravated felony,

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[6] Indeed, the Seventh Circuit's recent decision in *United States v. Pacheco-Diaz, supra,* finding that a second drug possession conviction for a crime committed after a prior such conviction had become final is a "drug trafficking crime" aggravated felony, did not even allude to 21 U.S.C. § 851, which we take to mean that the court did not find it relevant.

provided only that the finality requirement in 21 U.S.C. § 844(a) is met. That is indeed the conclusion recently reached by the Seventh Circuit in *United States v. Pacheco-Diaz, supra,* and nothing in the majority opinion, which counsels Immigration Judges to reach the opposite conclusion where not precluded by circuit law, persuasively refutes this simple yet powerful extrapolation from the analysis employed by the Supreme Court in *Lopez.* The Seventh Circuit's determination in this regard is particularly telling because that court was one of a minority of circuits that, prior to *Lopez*, had adopted the very hypothetical Federal felony approach that the Court in *Lopez* later endorsed. Hence, on the most basic level, any position asserting the need for a recidivist prosecution *by the State* would seem to be, as the Seventh Circuit recently concluded, in conflict with the approach endorsed by the Court in *Lopez* itself.[7]

2. Position of the Majority Opinion

The majority opinion treats the Supreme Court's decision in *Lopez v. Gonzales* as essentially irrelevant beyond its recognition in footnote 6, quoted earlier, that *some* State recidivist drug possession offenses qualify as aggravated felonies. That is, our colleagues regard themselves as free, notwithstanding

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[7] All this calls into question what the Court may have had in mind in its somewhat Delphic footnote 6 wherein it referred to State "counterparts" to the Federal recidivist statute. That reference is explicable, consistent with the above analysis, if one finds that the Court was merely noting that in reality there are States that have recidivist provisions, not that their existence is essential or even meaningful in the ultimate aggravated felony determination.

Lopez, to decide on the methodology to be employed in determining when a State second drug possession conviction that meets the finality requirements of 21 U.S.C. § 844(a) can qualify as a conviction for a "drug trafficking crime." As previously noted, our inability to agree with the majority's merits analysis stems from its jettisoning of *Lopez* as providing a guidepost on the methodology to be used. Thus unfettered, the majority opinion proceeds to "invent" a statute[8] by concluding that the State must at a minimum have "sought to impose punishment for a recidivist drug conviction," a prerequisite it finds is mandated primarily by *Oyler v. Boles,* 368 U.S. 448 (1962), a case that, so far as we are aware, has been cited by *no* court of appeals that has addressed this issue and was not cited by the Supreme Court in *Lopez*. *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 391 (BIA 2007). On the basis of its determination that the State of Texas did not provide an adequate opportunity for the respondent to challenge whether he was a recidivist drug possessor, the majority opines that it would find in his favor if free to do so.

The majority's novel reliance on *Oyler v. Boles, supra,* is misplaced. That case, and lower court decisions that follow it, were rendered in the criminal context. *E.g., United States v. Moore,* 208 F.3d 411 (2d Cir. 2000). Thus, their due process holding that at some point *in the criminal case*, though not necessarily before trial, a defendant must be afforded a fair opportunity to challenge his alleged status as a

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[8] As will be evident later on, we share the view that the statute should be "invented" or rather reinvented. But that is decidedly not our function or that of the Federal courts. Rather, it is the sole province of Congress.

recidivist is limited to the criminal context. We believe that *Oyler v. Boles* does not apply where the issue, as here, is whether the respondent's second State conviction is a *hypothetical* rather than an actual Federal felony conviction and hence does not involve a defendant who was, in fact, sentenced as a recidivist. *See United States v. Williams*, 326 F.3d 535 (4th Cir. 2003) (discussed *infra* as to the significance of the phrase "punishable under" found in 18 U.S.C. § 924(c)(2), which denotes a potential rather than an actual punishment).

Moreover, even assuming arguendo the contrary, the present case arises in the immigration arena, where what is a fair opportunity to challenge whether the respondent is a recidivist, so as to comport with due process, differs. Thus, there appears no reason why the respondent's due process right *in this proceeding* was not satisfied by the opportunity he was given, and failed to avail himself of, to make such a challenge before the Immigration Judge. Immigration Judges have authority to entertain and resolve factual claims by aliens that convictions attributed to them are actually the convictions of another (for example, a person with the same name), or to introduce evidence showing that a conviction has been subsequently vacated on the merits. *See generally Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds*, 454 F.3d 525 (6th Cir. 2006). It is hardly revelatory to recognize that due process requirements may vary as among the criminal and immigration spheres (e.g., as to the right to appointed counsel), and that generally more process is due in the former. Moreover, to find as we do that *Oyler v. Boles* has no application in an immigration proceeding where the question is whether an alien

has a prior conviction does not violate the principle in *Leocal v. Ashcroft,* 543 U.S. 1, 11 n.8 (2004), that a statute, such as the aggravated felony provision at issue in this case, that is applicable in both the criminal and immigration contexts, must be interpreted consistently. That principle applies with respect to the elements of the offense in the statute, not, as here, to what kinds and degree of procedural due process apply in each forum. In short, given that the respondent had a chance to challenge whether he had a prior Texas drug conviction, as asserted by the DHS, and failed to do so, he was afforded due process.

In addition to the above, *United States v. Williams, supra,* supports our view that neither the applicable statutes at issue here nor due process requires compliance with State procedures governing recidivist treatment before an enhanced sentence may be imposed on, or attributed to, the defendant on the basis of prior convictions. The court in *Williams* was construing the requirements of the Armed Career Criminal Act, 18 U.S.C. § 924(e) (Supp. III 2003). In rejecting the Government's argument that the statute's requirement of a conviction for an offense carrying a maximum sentence of 10 years or more could be met even if the State did not invoke its recidivism enhancement procedures for elevating the applicable sentence to 10 years, the court observed:

> A comparison between different subsections of § 924 reinforces the conclusion that the government's argument is inconsistent with the plain reading of the statute. The definition of a 'drug trafficking crime' under 18 U.S.C. § 924(c)(2) is, in part, 'any felony punishable under the Controlled Substances Act.' This definition, by way

> of the phrase 'punishable under,' includes crimes under state law which are *potentially punishable under federal law, even absent an actual federal charge or conviction.*

United States v. Williams, supra, at 541 (emphasis added); *see also United States v. Harp,* 406 F.3d 242 (4th Cir.), *cert. denied*, 546 U.S. 919 (2005). In short, the court in *Williams*, in accord with the Seventh Circuit's decision in *United States v. Pacheco-Diaz, supra,* treated the phrase "punishable under" as consistent with the hypothetical felony approach later adopted by the Supreme Court in *Lopez*, as applied to the very question presented by this case, namely whether a State must invoke its recidivist procedure in order for a second offense to be found "punishable under" recidivist penalties for Federal purposes. The clear implication of the court's analysis and statement is that a different result, i.e., that the State need *not* have invoked its recidivism procedures, would have obtained if the question had been the interpretation of § 924(c), at issue here, rather than § 924(e).

One other aspect of the majority's opinion deserves mention. It asserts that States with no available recidivism laws are similar to States that lack laws criminalizing possession with intent to distribute (which it rightly observes the Court in *Lopez* treated as not having statutes constituting an aggravated felony notwithstanding that the quantity of drugs possessed would have supported a trafficking charge). *Matter of Carachuri-Rosendo, supra*, at 391-92 n.7. The analogy is inapt. A State law that uses quantity as a proxy for intent to distribute but that lacks an actual distribution *element* is different from the issue at hand, in terms of the hypothetical

Federal felony approach that the *Lopez* Court adopted, because to find that a *second* State drug possession offense in a State lacking a recidivism statute is not an aggravated felony the majority need to assume the answer to the very question posed, i.e., whether such an offense would be a hypothetical felony under 21 U.S.C. § 844(a).

3. Position of the Respondent and Amicus Curiae

The respondent and amicus curiae essentially adopt the Third Circuit's view prior to *Lopez v. Gonzales* that, in order for a State simple possession offense that was committed after a prior drug conviction became final to be a "drug trafficking crime" aggravated felony, it must be shown that the second conviction was the result of a State criminal proceeding that observed procedural formalities equivalent to those required under 21 U.S.C. § 851 in a Federal proceeding, i.e., the furnishing of a pretrial "information" alleging the prior conviction, with an opportunity to challenge whether it pertains to the defendant and, if it was rendered within 5 years of the information, providing an opportunity to challenge the validity of that conviction on constitutional grounds.[9]

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[9] *See Gerbier v. Holmes,* 280 F.3d 297 (3d Cir. 2002); *Steele v. Blackman,* 236 F.3d 130 (3d Cir. 2001). The respondent also cites *Berhe v. Gonzales,* 464 F.3d 74 (1st Cir. 2006), as supportive. However, it is not clear that *Berhe* comports with the respondent's view. The decision may be read to hold merely that the Government failed sufficiently to show the *existence* of a prior State conviction, not necessarily that such existence must be established through evidence in the conviction record of the second conviction showing that the alien was charged as a recidivist. *See id.* at 86 ("Because the record of conviction here contains no reference to Berhe's prior conviction, or to any other factor that would hypothetically convert his 2003 state

Even assuming that the preceding argument in Part II.B. 1. somehow fails to carry the day, *Lopez v. Gonzales* also dictates rejection of the respondent's and the Third Circuit's position for other reasons requiring a more complicated exposition. Contrary to the majority's position that *Lopez* is neutral as to the methodology to be employed here, we reiterate our belief that the Court in *Lopez* signaled the proper mode of analysis to be applied to the issue before us. In the course of its discussion repudiating the Government's argument that the final sentence of section 101(a)(43), under which Congress provided that the term "aggravated felony" also applies to an offense described therein "whether in violation of Federal or State law," supported its construction, the Court declared that the quoted language had other purposes than the one asserted by the Government, among them that "it confirms that a state offense whose *elements* include the *elements* of a felony punishable under the [Controlled Substances Act] is an aggravated felony." *Lopez v. Gonzales, supra,* at 631 (emphasis added). This statement unmistakably implies that the correct method to determine whether a State drug offense has a felony counter-

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misdemeanor conviction into a felony under federal law, the Board erred by concluding that his 2003 conviction was an 'aggravated felony' under 8 U.S.C. § 1101(a)(43)."). Moreover, there is nothing in *Berhe* indicating that the court considered whether the State had a procedure like 21 U.S.C. § 851 that also allowed a defendant to raise certain constitutional challenges to the prior conviction, as opposed to merely alleging its existence for recidivist prosecution purposes. In contrast, both the respondent and the amicus here insist that in order to qualify as a "counterpart" State conviction to a felony violation of 21 U.S.C. § 844(a), a State law must embody *both* aspects.

part in the Controlled Substances Act is to look only to the "elements" of the State offense as charged and determine whether that same charge, assuming a Federal conviction therefor under the Controlled Substances Act, corresponds to a felony under that Act. Such a method is indeed consistent with the approach the Board originally followed. *See Matter of Barrett, supra*; *Matter of L-G-*, 21 I&N Dec. 89, 90-91 (BIA 1995). The approach, focusing on "elements," is both consistent with the categorical approach normally followed by the Court,[10] and functions in a manner that normally readily resolves, consistently with the holding in *Lopez*, the question whether a *single* State drug conviction qualifies as an aggravated felony conviction.[11]

However, as noted by the majority, owing to a quirk in the Court's Sixth Amendment jurisprudence, the message of *Lopez* insofar as the issue before us is concerned relating to recidivist drug possession convictions (no one of which would on its own be a drug trafficking crime) is clouded by the fact that applying

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[10] *E.g., Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007); *Taylor v. United States*, 495 U.S. 575 (1990).

[11] To wit, irrespective of how the State punishes the crime (i.e., even if punished as only a misdemeanor), if a single State drug offense involves a trafficking element, the conviction counts as an aggravated felony "drug trafficking crime" conviction because Federal law, 21 U.S.C. § 841 (2000 & Supp. IV 2004), subject to a single exception, 21 U.S.C. § 841(b)(4), punishes such offenses as felonies). But where the State nonrecidivist drug conviction, even if punished as a felony by the State, is for possession unaccompanied by a trafficking element (i.e., is of the type involved in *Lopez*), it does not count as an aggravated felony "drug trafficking crime" because Federal law punishes such crimes as only misdemeanors. 21 U.S.C. § 844(a).

the word "elements" in its literal sense would have the effect of meaning that *no* such State recidivist convictions could be so classified, contrary to the *Lopez* Court's acknowledgment in footnote 6 of "counterpart" (to 21 U.S.C. § 844(a)) State drug recidivism convictions as "clearly"constituting aggravated felonies. For if only "elements" in this context are examined, then the felony provisions of 21 U.S.C. § 844(a) do not qualify since what elevates a recidivist drug possession conviction to felony level under that statute is not an "element" but instead a penalty enhancement based on recidivism, which the Court, for constitutional purposes, has found *not* to be an element (or more accurately the functional equivalent of an element) whose existence must be found by the trier of fact beyond a reasonable doubt. *Compare Almendarez-Torres v. United States,* 523 U.S. 224 (1998) (finding that enhancement based on recidivism need not be proved to jury beyond a reasonable doubt), *with Apprendi v. New Jersey,* 530 U.S. 466 (2000), *and Cunningham v. California,* 127 S. Ct. 856 (2007) (holding that *except for a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed maximum must be submitted to a jury and found beyond a reasonable doubt). Notably, neither the respondent nor amicus nor the majority opinion argues for such a construction of *Lopez* whereby there would be no State "counterpart" felony recidivist offenses to those in 21 U.S.C. § 844(a), nor is such a construction reasonable or permissible in light of that decision.

Harmonizing, therefore, the Supreme Court's pronouncement in *Lopez v. Gonzales, supra,* at 630 n.6, as to State recidivist drug possession crimes "clearly" constituting aggravated felonies with its later

statement that a "state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony," *id.* at 631, it is reasonable to conclude that the Court (which wrote the above-quoted words in the context of a State nonrecidivist felony possession case and was likely not considering them in relation to the 21 U.S.C. § 844(a) recidivist drug possession circumstance) must or would have intended that, for those recidivism situations of the type presented here, the term "elements" should be construed to include cases that fit the penalty enhancement requirements of 21 U.S.C. § 844(a) (i.e., State convictions for simple drug possession involving acts committed after a prior drug conviction has become final).

The dispositive question then, on this mode of analysis, is whether 21 U.S.C. § 851, relied on by the respondent, is also deemed an "element" of the recidivism felony violation described in 21 U.S.C. § 844(a). The answer plainly is in the negative. An element of an offense, the Supreme Court has found, is a "fact necessary to constitute the crime." *In re Winship*, 397 U.S. 358, 364 (1970); *see also Mullaney v. Wilbur,* 421 U.S. 684, 697-99 (1975). Under this standard, it is evident that 21 U.S.C. § 851 cannot be regarded, by any stretch of the imagination, as an "element" of the felony violation found in 21 U.S.C. § 844(a). A Federal jury is not required to find compliance with § 851 beyond a reasonable doubt; indeed, such compliance is not something a Federal jury would necessarily even be apprised of. Even the Third Circuit, which found such compliance to be required for aggravated felony status of a State recidivist conviction, acknowledged as much. *See Steele v. Blackman,* 236 F.3d 130, 137 (3d Cir. 2001) ("While

the status of being a 'one time loser' is not technically an element of the offense proscribed by § 844(a), we agree with the District Court that it can be treated as such.").[12]

The last clause in this statement is insupportable in our view in the wake of *Lopez*. As noted, *Lopez* has indicated that whether a State drug offense is properly regarded as "described in" (*see* section 10 l(a)(43) of the Act, quoted earlier) the Controlled Substances Act is determined by whether its *elements* so correspond. Our disagreement with the respondent (and with the Third Circuit) after *Lopez* stems from the fact that, aside from being "technically" a nonelement, § 851 forms no part of the "description" of the offense in § 844(a). The separate provisions found in § 851, which apply not just to § 844(a) but throughout the Controlled Substances Act, do not relate to the *circumstances* of the conviction itself, such as whether it was committed after a prior such conviction became final as provided in § 844(a). In this respect, § 851 is unlike penalty enhancements applicable to controlled substance convictions, whether of the *Almendarez-Torres* type found in § 844(a) (relating to recidivism) or of the type governed by *Apprendi*, such as whether the offense was committed in a protected area like a school zone or with the use of a firearm or dangerous weapon. Instead, § 851 merely establishes a procedural hurdle that must be surmounted before higher (felony level) penalties

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[12] This sort of ipse dixit pronouncement is echoed in the majority opinion's assertion that, despite being nonelements, *Oyler v. Boles*'s "minimal requirements governing findings of recidivism are part and parcel of what it means for a crime to be a 'recidivist' offense." *Matter of Carachuri-Rosendo, supra*, at 391.

may be imposed. *See, e.g., United States v. Severino*, 316 F.3d 939, 943 (9th Cir. 2003) ("stating that [s]ection 851 is a procedural statute"). A procedural requirement is not even a substantive one, much less one that constitutes an "element." Hence, in some ways, this case is less difficult than the issue the Board faced in *Matter of Vasquez-Muniz*, 23 I&N Dec. 207 (BIA 2002), where the question was whether a State firearms offense punishing possession by a convicted felon was "described in" 18 U.S.C. § 922(g)(1) (referenced in section 101(a)(43)(E)) despite the fact that the State offense lacked the jurisdictional *element* relating to interstate commerce found in the Federal provision. We concluded there that the reference in section 101 (a)(43) to the incorporation of State offenses "described in" the Federal offenses enumerated in that paragraph was not intended to include purely "jurisdictional" elements. Here, by contrast, 21 U.S.C. § 851 under no conceivable definition can be said to constitute an "element" of § 844(a) or any other offense.

Undoubtedly, for a *Federal* defendant convicted under 21 U.S.C. § 844(a), compliance with 21 U.S.C. § 851 is mandatory in order to have a possessory offense under that statute attain felony status. *See United States v. LaBonte*, 520 U.S. 751, 754 n.1 (1997).[13] But the same is true of many procedural and substantive requirements that exist at the Federal but not the State level, some of which are of

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[13] It is, however, well settled that noncompliance with § 851 may be harmless error. *United States v. Dodson*, 288 F.3d 153, 159, 160 & n.9 (5th Cir. 2002); *United States v. Severino, supra*, at 947-48; *United States v. Hill*, 142 F.3d 305, 312-13 (6th Cir. 1998).

constitutional dimension, such as the rights to indictment for a felony, to a unanimous jury, and to a trial before an Article III judge. The existence of such requirements, and the fact that failure to follow them will often invalidate a conviction, does not transform them into "elements." Similarly, one can readily imagine other situations in which a State drug prosecution would be lawful under State but not Federal law, such as where the State has a longer period of limitation. Yet State convictions rendered under these circumstances nevertheless plainly qualify as aggravated felony convictions in light of the provision in section 101(a)(43), quoted earlier, alluding to coverage of an offense "described in this paragraph whether in violation of Federal or State law." *See also United States v. Harden,* 37 F.3d 595 (11th Cir. 1994). As *Lopez* makes clear, the focus in ascertaining whether a State offense is "described in this paragraph" is on the *elements* of the aggravated felony described, not on other State or Federal legal requirements that must be satisfied, however significant they may be. Furthermore, it is of no moment that, unlike the Federal constitutional and statutory provisions adverted to above, the provisions of 21 U.S.C. § 851 do not apply throughout the Federal criminal code but exist solely in relation to Federal drug prosecutions. To illustrate through another example, Congress has imposed a requirement for a prosecution under 18 U.S.C. § 3261 (2000), relating to offenses committed abroad by certain persons, that if a prosecution was or is being pursued by a foreign government for the same conduct, no prosecution under that section may be commenced unless approved personally by the Attorney General or the Deputy Attorney General (or a person acting in either capacity). 18 U.S.C. §

3261(b). Let us suppose that a like high level approval requirement existed in order to pursue a felony charge based on recidivism under 21 U.S.C. § 844(a). Notwithstanding such a hypothetical procedural restriction, it could hardly be contended that it is an element of the offense.[14]

Therefore, we are unable to conclude that lack of compliance with the procedural requirements of § 851, even if it were the case that comparable provisions commonly existed at the State level, has the effect of disqualifying from aggravated felony status a State drug possession conviction that meets the recidivist quasi-"elements" of 21 U.S.C. § 844(a).

The respondent's claim in this respect is essentially to cherry-pick § 851 and argue that it alone must be complied with even though other equally or more important Federal requirements, both substantive and procedural, for a lawful conviction need not be, in order to determine whether a second State drug possession conviction is a "counterpart" to that described in 21 U.S.C. § 844(a). There is no logical support for this argument. Moreover, the contention has been rejected by the only Federal courts to have yet considered it *post-Lopez*, at the district court level. *See United States v. Lopez-Molina,* 494 F. Supp. 2d 517 (W.D. Tex. 2007); *United States v. Castro-Coello,* 474 F. Supp. 2d 853 (S.D. Tex. 2007), *aff'd sub nom. United States v. Molina-Gonzales,* 234 Fed.

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[14] The same would be true of other, offense-specific hypothetical requirements in § 844(a), e.g., relating to the existence of an affirmative defense not found under State law. *See Dixon v. United States,* 126 S. Ct. 2437 (2006) (stating that affirmative defenses are not elements).

Appx. 319 (5th Cir. July 17, 2007). In sum, there is no reason to require that a State have *followed procedures* analogous to those mandated by Federal law for felony status, but which may not even exist under State law.

We repeat, moreover, that the respondent has not denied that he was the individual convicted of the prior drug possession offense nor has he raised a prima facie challenge to its validity nor denied the finality of the second conviction. Since, as noted earlier, *supra* note 13, noncompliance with § 851 may constitute harmless error, were we otherwise not inclined to reject his claim it would be appropriate to examine more closely the issue whether any alleged error in this case affected the respondent's substantial rights. *Cf. Neder v. United States,* 527 U.S. 1 (1999) (stating that even most constitutional errors can be harmless).

Having responded to the respondent's contentions predicated on noncompliance with 21 U.S.C. § 851, we must next focus on 21 U.S.C. § 844(a) itself and address the argument that, under the hypothetical Federal felony approach, the respondent's second conviction does not qualify for felony treatment, because those quasi-"elements" that serve to elevate the offense from a misdemeanor to a felony were not charged by the State of Texas. This separate but related argument has two strands. It is true that, under the hypothetical Federal felony approach, the normal method for determining whether a State controlled substance offense qualifies as a hypothetical Federal felony (or is "analogous" to a Federal felony) is to take the State offense as charged (i.e., the elements thereof) and ascertain whether a correspond-

ing Federal offense exists at a felony level under the Controlled Substances Act. *See, e.g., Matter of Davis, supra*, at 544 (stating that "[t]he Service correctly reads *Barrett* as requiring a comparison between the elements of the underlying ... drug offense and a federal drug provision referenced in 18 U.S.C. § 924(c)(2)"). If that approach were followed here, the argument runs, then the respondent would prevail because the State did not charge the respondent's second offense as a recidivist offense so that the Federal offense to which it would correspond would not be that in § 844(a)'s recidivist provision. However, the argument is flawed and proves too much.

As noted earlier, § 844(a)'s recidivist provision contains two intertwined components, one that the second offense is a controlled substance possession crime, and the other that it was committed after the conviction for the first controlled substance offense became final. It is not possible to "split the baby" by focusing solely on the existence of the first drug offense and disregarding the timing of commission of the second such offense, nor does the respondent argue for such an analysis. Some States, like Texas, have statutory provisions that allow second offenses to be charged as recidivist crimes. But no State of which we are aware has a statute that contains a timing provision that mandates, for increased punishment purposes, that the second offense must have been committed after the conviction for the first offense has become final in the same manner as is required under § 844(a).[15] Thus if both components

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[15] The "finality" aspect of § 844(a) goes beyond mere exhaustion of direct appeal and includes the exhaustion of direct discre-

must have been charged, in an element-like fashion by the State, then again the upshot would be that *no* State "counterparts" to 21 U.S.C. § 844(a) would exist, contrary to Lopez's affirmation that there are indeed State "counterparts" to the provisions of § 844(a) and that such "counterparts" clearly constitute "drug trafficking crime" aggravated felonies.

The conclusion to be drawn from this is that, once again, owing to the peculiarity in § 844(a) that the features that elevate the grade of the offense to felony level are not true "elements," the ordinary methodology of the hypothetical Federal felony approach whereby the *elements* of a State drug offense are compared need not, indeed cannot, be applied. Rather, it appears that the analysis to be followed consists only of an after-the-fact examination by the Immigration Judge, the Board, or a Federal court whether the element-like requirements of § 844(a) *exist*, that is, whether the individual was convicted of a second or subsequent drug possession crime and whether that crime was committed after a previous such offense became final. *United States v. Pacheco-Diaz, supra.* On no other reading of the Act, as we see it, can life be given to the *Lopez* Court's identification of State "counterpart" offenses to 21 U.S.C. § 844(a) as "drug trafficking crimes" under section 101(a)(43)(B) of the Act.

Nor does the failure of a State prosecutor to invoke a recidivist statute that exists in his or her jurisdiction mean that the hypothetical Federal felony approach

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tionary review. *See Smith v. Gonzales, supra.*

does not extend to a factually recidivist violation, because the exercise of the State prosecutor's discretion not to so charge the defendant is (allegedly) at odds with the application of that approach to 21 U.S.C. § 844(a). This may be the strongest argument in favor of the respondent in our view, but it is insufficient.[16] The hypothetical Federal felony approach focuses not on with what drug offense the State charged a defendant, but on whether, if federally prosecuted, that State violation *could* have been prosecuted successfully as a felony under the Controlled Substances Act.

For example, it would not prevent a State drug trafficking misdemeanor from being treated as a "drug trafficking crime" aggravated felony even if the defendant could point to a formal policy in the applicable United States Attorney's office, or even of the Attorney General, that drug-trafficking prosecutions involving the quantity of drugs trafficked by the defendant should not be pursued, and instead should be charged, if at all, only as simple possession crimes. That is so because whether or not the Federal prosecutor *would* have prosecuted the State of-

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[16] It qualifies as the strongest argument because it is possible to imbue it with textual support from the *Lopez* decision. That is, the contention could be made that, by referring in footnote 6 to "recidivist possession," the Court was alluding to only those offenses where the State had charged the defendant as a recidivist. However, it appears that by so doing the Court was merely using "recidivist possession" as a shorthand expression for describing the provisions of § 844(a). Notably, the Court in footnote 6 immediately followed its use of the phrase "recidivist possession" with a citation to 21 U.S.C. § 844(a), and nowhere mentioned § 851. Moreover, neither § 844(a) nor § 851 uses the term "recidivist."

fense as a Federal felony is irrelevant. Under *Lopez* the pertinent inquiry is whether, looking only to the elements of the State offense as prosecuted, that offense *could* have been successfully pursued at the felony level under the Controlled Substances Act (or one of the other enumerated drug statutes in 18 U.S.C. § 924(c)). *See United States v. Williams, supra.*

Translating that principle to the instant context, where we have shown that, because of the peculiarity that the recidivist requirements for felony treatment in § 844(a) are not true "elements," an adjudicator must simply look to see whether, factually, the individual incurred a prior drug conviction that had become final, it is evident that whether or not the State prosecutor elected to invoke an available recidivist provision is immaterial to the aggravated felony determination as regards a second State drug possession crime. A Federal prosecutor presented with the elements of such an offense *could* elect to use 21 U.S.C. § 844(a) (hypothetically exercising discretion to invoke the necessary procedural prerequisites in § 851) to bring a felony prosecution, and that possibility makes the offense "analogous" to one under the Controlled Substances Act and brings the defendant's second drug possession offense within the ambit of the felony provisions of 21 U.S.C. § 844(a). *See United States v. Pacheco-Diaz, supra.*

Finally, the respondent also makes an argument based on application of the categorical approach first announced by the Supreme Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), and which the Court has also held applies in immigration proceedings. *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007).

Under the categorical (and modified categorical) approach in those and other cases, it is well settled that in order to determine whether a conviction constitutes an aggravated felony under section 101(a)(43), only the record of conviction may be consulted. The respondent contends that since the record of conviction of his *second* offense does not advert to his prior conviction, it follows that, if the categorical approach is utilized (as he asserts is mandatory), the fact of the respondent's earlier conviction, coming as it does from an impermissible source, must be disregarded such that his second conviction standing alone would not be a felony if prosecuted federally. The DHS disputes that, in this context, the categorical approach must be observed, noting that in at least one other circumstance the Board has found that to do so would render nugatory one of the aggravated felonies set forth in section 101(a)(43). *See Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007); *see also Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007) (decided after oral argument in this case).

The respondent's argument is unpersuasive. At the outset, there is an aura of unreality to the contention that consulting a record of conviction (albeit a different record from the one alleged to constitute an aggravated felony) per se contravenes the categorical approach. That approach was devised in the criminal context, *see Taylor v. United States, supra*; *Conteh v. Gonzales,* 461 F.3d 45, 55 (1st Cir. 2006) (noting that the categorical approach in that context is "informed by constitutional concerns" and "cannot be applied woodenly to removal cases"), as a means of determining whether the statutory *definitions* of the types of convictions designated as aggravated

felonies in section 101(a)(43) of the Act are or are not met by a particular conviction, in large part in order to avoid the burdensome task of adverting to the conduct underlying a conviction and in effect having to retry some or all of the criminal case. *See also Matter of Pichardo*, 21 I&N Dec. 330, 335-36 (BIA 1996). We are unaware that the categorical approach has ever been applied, in circumstances like those here, to forbid recourse to a record of conviction, where the record of conviction consulted contains sufficient proof of the existence and nature thereof, which is where the argument of the respondent would lead.[17]

Requiring adherence to the categorical approach in these circumstances would effectively mean once again that *no* recidivist State drug possession conviction could qualify as a "drug trafficking crime" aggravated felony because the necessary element-like fact of whether the prior conviction had "become final" when the second or subsequent offense was committed cannot be ascertained from the record of conviction of the second offense, even on the assumption of the respondent that a second State conviction must also include compliance with procedures akin to 21 U.S.C. § 851. Since that is inconsistent *with Lopez's* acknowledgment that State recidivist offenses can be aggravated felonies, it is evident that the Court did not contemplate that the ordinary categorical approach be followed to determine whether the requirements set forth in 21 U.S.C. §

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[17] *Cf. United States v. Snellenberger*, 493 F.3d 1015 (9th Cir. 2007) (holding that a minute order is insufficient to prove the nature of a conviction and cannot be considered under the categorical approach).

844(a) for felony treatment of a recidivist conviction are met. Moreover, the Act and its regulations clearly prescribe the modes of evidence that may be used "in proving a criminal conviction" in immigration proceedings, 8 C.F.R. § 1003.41 (2007), and also allow for taking administrative notice of the contents of "official records." 8 C.F.R. § 1003.1(d)(3)(iv); *see also* section 240(c)(3)(B) of the Act, 8 U.S.C. § 1229a(c)(3)(B)(2000).[18] As the categorical approach is subject to legislative alteration, at least in the immigration context, these provide an independent basis for consulting the record of the respondent's prior conviction to determine whether the quasi-"element" found in 21 U.S.C. § 844(a) of a prior conviction that has become final before the second conviction, exists. In other words, even if, despite the views above, the categorical approach were thought generally applicable to the enhancement "elements" in § 844(a), the overriding statutory and regulatory provisions applicable to immigration proceedings would permit recourse to the record of conviction of the first conviction.

4. Position of the DHS

We may quickly dispose of the DHS's position as most of the issues attendant thereto have been previously addressed. The DHS in its supplemental brief modified its position from the one we find correct, namely that the pertinent inquiry is not whether an alien like the respondent was actually prosecuted as a recidivist under State law but rather

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[18] While the latter regulation is applicable only to the Board, case law uniformly extends the same authority to Immigration Judges whose basic function is to find facts.

whether he could have been so prosecuted as a felon under 21 U.S.C. § 844(a), to one that concedes that, where a State has a drug-statute-specific recidivist provision (but not a general recidivist statute), a State's failure to invoke that statute means that, under *Lopez*, the alien cannot be regarded as having been convicted of an aggravated felony. We have not been made privy to the reasons for this lately arrived at view, which appears to strain logic beyond the breaking point. Thus, we have explained above why the hypothetical Federal felony approach does not require that a State prosecutor have invoked an available recidivism statute. If that argument is found wanting, then we fail to understand why it makes a shred of difference whether the State recidivism statute is of a general or drug-specific nature. Either the State prosecutor's choice to charge a defendant alien as a recidivist drug offender is a prerequisite to the determination under *Lopez* of aggravated felony status or it is not.

5. Other Issues

We add a few words about policy inasmuch as the parties and amicus all stressed the importance of such considerations. For their part, the respondent and amicus called attention to the significant purposes served by 21 U.S.C. § 851 in assuring that defendants were not found to be aggravated felons on the basis of constitutionally invalid prior State convictions, which they asserted were not infrequent at the misdemeanor level. The Third Circuit also noted this factor in reaching its conclusion prior to *Lopez*. *See Gerbier v. Holmes, supra,* at 317 ("For all that the record before the immigration judge reveals, the initial conviction may have been constitutionally im-

paired."). The DHS responded by noting that ordinarily aliens in removal proceedings are not permitted to collaterally challenge their convictions,[19] and by alluding to the congressional findings accompanying the Controlled Substances Act, including that found at 21 U.S.C. § 801(2) (2000) ("The illegal importation, manufacture, distribution, and *possession* and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.") (emphasis added).

The Board of course declines to consider policy matters except to the extent they may bear on the proper interpretation of an otherwise ambiguous statute as embodied in congressional findings or applicable legislative history. In the present circumstances, we have not relied on the policy considerations advanced by the respondent or amicus, or by the DHS. For, as set forth above, we believe that the issue of whether a State must comply with procedures like those found in 21 U.S.C. § 851 for a recidivist drug possession offense to be an aggravated felony is essentially governed, under *Lopez*, by recourse to the question whether the requirements of § 851 are in the nature of offense "elements." Finding them not to partake of such character, we hold that compliance therewith is not necessary.

Notwithstanding that it is not our custom to comment on the wisdom of statutes, however, we would be remiss in failing to note the bizarre results that

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[19] *See, e.g., Taylor v. United States*, 396 F.3d 1322, 1330 (11th Cir. 2005) (citing *Zinnanti v. INS*, 651 F.2d 420 (5th Cir. 1981)); *see also Trench v. INS*, 783 F.2d 181 (10th Cir. 1986).

flow from section 10 l(a)(43)(B) as construed by the Supreme Court in *Lopez*. As that Court recognized, several States have no trafficking offenses and use the quantity possessed as a proxy for trafficking. In such States, a felony conviction for possession of the largest amount of a controlled substance ever found in the possession of an individual anywhere in the world, wherein the defendant received a very long or even life sentence, would nonetheless, under *Lopez*, not be an "aggravated felony" conviction.[20] In contrast, because 21 U.S.C. § 841 treats as a felony any transfer of a mixture containing the most minute detectable amount of a controlled substance even if not done for remuneration (except for small amounts of marihuana), *see* 21 U.S.C. § 841 and the definitions in 21 U.S.C. § 802 of the terms "distribute" and "deliver," a State misdemeanor conviction for transferring a tiny amount of a nonmarihuana controlled substance to a friend for no remuneration, wherein no incarcerative sentence was imposed is, under *Lopez*, a conviction for an "aggravated felony." The Supreme Court in *Lopez* cited the book *Alice in Wonderland* in rejecting the Government's interpretation of section 101(a)(43)(B). *See Lopez v. Gonzales, supra,* at 630 n.5. Yet certainly the statute it has left for application has some troubling and fantastical qualities.[21]

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[20] And would not be, under the respondent's submission, even if such a hypothetical defendant had incurred numerous huge quantity felony convictions, if the State had no procedure comparable to 21 U.S.C. § 851 or had such a procedure but declined to use it.

[21] In so observing, we do not mean to suggest that the Court was wrong in its interpretation. The Government's position likewise would have created anomalous outcomes since it would have left the "aggravated felony" determination dependent

The result we have determined is required here may fairly be regarded as harsh.[22] But that is not the proper concern of an adjudicator whose function is to ascertain the meaning of a statute and then apply it. It is, however, the appropriate province of the Congress. Since the "aggravated felony" definition in section 101(a)(43)(B) affects not only immigration proceedings (which are important in their own right) but the length of Federal sentences and thus directly implicates liberty interests, we respectfully suggest that Congress may wish to reexamine the statute and attempt to arrive at a more rational formulation. In doing so, it could also, if so inclined, address the question we decide today involving State recidivist drug possession offenders.

III. CONCLUSION

Under 21 U.S.C. § 844(a), an offense involving the simple possession of a controlled substance is a felony punishable by up to 2 years' imprisonment if committed after a prior drug conviction became final. *See* 21 U.S.C. §§ 802(13), (44) (2000 & Supp. IV 2004); 18 U.S.C. § 3559(a) (2000). As there is no challenge to the finality of the respondent's second conviction or to the existence of the first, pursuant to

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upon the vagaries of State law in classifying possession offenses as misdemeanors or felonies. Where neither plausible construction of a statute produces a sensible result, it appears appropriate that Congress reexamine its handiwork.

[22] Though not necessarily any harsher than the one alluded to above whereby a single transfer for no remuneration of a tiny amount of a controlled substance, e.g., to a family member or friend, constitutes an aggravated felony.

Lopez v. Gonzales, supra, that latter conviction therefore qualifies as a conviction for a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and, by extension, an aggravated felony under section 101(a)(43)(B) of the Act, as it would be analogous to an offense punishable as a felony under the Federal drug laws, notwithstanding that the State did not use procedures like those found in 21 U.S.C. § 851 applicable in the Federal sphere. Accordingly, as the respondent could have been punished for a felony under the recidivist possession portion of 21 U.S.C. § 844(a), the record reflects that he has been convicted of an aggravated felony. As he remains statutorily ineligible for relief from removal, there is no need to address the remaining arguments presented on appeal.

CONCURRING OPINION: Frederick D. Hess, Board Member

I respectfully concur in the majority's determination that the respondent has been convicted of an aggravated felony under section 10 l(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (2000). I believe this case is fully controlled by the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Sanchez-Villalobos,* 412 F.3d 572 (5th Cir. 2005). As that case mandates this result, I do not believe that the other issues raised in this decision need to be addressed at this time. Were those issues properly before us, however, I would espouse the analytical approach set forth in the concurring opinion of Board Member Pauley.

APPENDIX C

IMMIGRATION COURT OPINION

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON(HSPC), TEXAS

File No.: A44 075 911,	December 19, 2006
In the Matter of:	In Removal Proceedings
Jose Angel Carachuri - Rosendo	
Respondent	

Charge: Section 237(a) (2) (B) (i) of the Immigration and Nationality Act(INA), as amended, controlled substance violation.

Application: Cancellation of Removal for Certain LPRs

For Respondent: Pro se

For the DHS: Assistant Chief Counsel, James Manning, Houston

DECISION OF THE COURT

Application: Cancellation of Removal for Certain LPRs For Respondent: Pro se

For the DHS: Assistant Chief Counsel, James Manning, Houston

The respondent is a 28 year old male, native and citizen of Mexico. The Service issued him the Notice to Appear(NTA) dated September 14, 2006, found at Exhibit 1. On the NTA the respondent is charged with being subject to removal because of his September 5, 2003 conviction for possession of the controlled substance, alprazolam and a subsequent conviction on October 28, 2004, for possession of marijuana, another controlled substance. The Respondent's pleas and the documentary evidence at Exhibit 2 establishes the truth of the allegations. The Court finds the evidence clear and convincing that the respondent is subject to removal as an immigrant convicted of a controlled substance violation.

As relief from removal the respondent submitted for consideration by the Court an application for Cancellation of Removal for Certain Permanent Resident Aliens(Exhibit 4)[1]. On November 27, 2006, the Court heard testimony and considered evidence on the Respondent's application for cancellation of removal. The Court reserved decision on the Respondent's application pending completion of criminal records and other background checks relative to the Respondent's eligibility to receive the relief he seeks.

---

[1] There is no Exhibit 3.

On December 5, 2006, the United States Supreme Court provided the nation with its binding interpretation of the Immigration and Nationality Act's definition of what controlled substance convictions qualify as aggravated felonies for immigration purposes, Lopez V. Gonzales, No. 05-547 2006 WL 3487031.[2] The definition essentially is that a state offense constitutes an aggravated felony for immigration purposes if it is an offense punishable by incarceration of more than a year under the Controlled Substance Act or other applicable federal law.

In this case, the Respondent's first controlled substance conviction in September 2003 for possession of alprazolam was not punishable as a felony under the Controlled Substance Act. That conviction is not for an aggravated felony. However, his second conviction in October 2004 for possession of marijuana is proscribed conduct punishable as a felony under federal law. 21 U.S.C.A. section 844(a) provides the penalties for simple possession:

> Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, **except** that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense

---

[2] In effect, this decision returns us to the state of the law as published by the Board of Immigration Appeals in its precedent decisions. See Matter of Davis, 20 Dec. 536(BIA 1992) and In Re L-G, 21 I.&N. Dec. 89(BIA 1995)

> chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500...

Because his second controlled substance conviction in state criminal proceedings carries the potential for incarceration of more than a year under federal law, his second conviction meets the definition of aggravated felony for immigration purposes.

As one convicted of an aggravated felony, he is statutorily ineligible for the relief he seeks. To be eligible for Cancellation of Removal for Certain Permanent Residents, the Respondent has to establish that he has not been convicted of any aggravated felony. *See* 240A(a) (3) of the INA.

Neither the Court nor the Respondent identifies any other possible form of relief from removal.

Whereas the Respondent has fully prosecuted his application before the Court and is found to be statutorily ineligible for cancellation of removal, the following is the order of the Court:

ORDER

It is hereby ordered that the respondent's application for cancellation of removal under section 240A(a) of the ACT be and is **DENIED.**

FURTHER ORDER

It is further ordered that the respondent be removed from the United States to Mexico on the charge contained on the Notice to Appear.

_____

Jimmie L. Benton
Immigration Judge

APPENDIX D

STATUTORY PROVISIONS INVOLVED

The United States Code, 8 U.S.C. § 1101(a)(43)(B), 8 U.S.C. § 1229b(a), 18 U.S.C. § 924(c)(2), 21 U.S.C. § 844, and 21 U.S.C. § 851, provides in pertinent part as follows:

8 U.S.C. 1101(a)(43)(B)
§ 1101. Definitions

(a) As used in this Act—

* * *

(43) The term "aggravated felony" means--

* * *

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)[.]

8 U.S.C. § 1229b(a)
§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien--

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

18 U.S.C. § 924(c)(2)
§ 924. Penalties

(c)(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

21 U.S.C. § 844
§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title [21 USCS § 823] or section 1008 of title III [21 USCS § 958] if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during

a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $ 1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $ 2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $ 5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $ 1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the con-

viction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

* * *

(c) "Drug or narcotic offense" defined. As used in this section, the term " drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this title.

21 U.S.C. § 851
§ 851. Proceedings to establish previous convictions

(a) Information filed by United States Attorney.

(1) No person who stands convicted of an offense under this part [21 USCS §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction. If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed

whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing.

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response.

Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence.

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations. No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

REPLY BRIEF

Supreme Court, U.S.
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NOV 25 2009
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(6)

No. 09-60

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government agrees with petitioner that this Court should grant certiorari in this case. As the Government explains: "a conflict has developed among the courts of appeals on the question presented in this case," U.S. Br. 14; "the question presented is an important and recurring one," *id.* at 8; and this case presents an "appropriate vehicle" for resolving the question, *id.* at 16. Consequently, "[t]he petition for a writ of certiorari should be granted." *Id.* at 17. Because petitioner and the Government agree that certiorari should be granted in this case, this reply brief is limited to addressing only certain basic points.

1. Petitioner agrees with the Government that "the question presented [in this case] is an important and recurring one on which there is a conflict among the courts of appeals." U.S. Br. 8. Four circuits, two of which considered the matter after this Court issued its decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006), have held that an alien convicted of simple possession cannot be held "convicted" of an aggravated felony, 8 U.S.C. § 1229b(a)(3), in the absence of any finding of recidivism in the proceeding before the convicting court. *See* Pet. 9-10 (discussing cases from the First, Second, Third, and Sixth Circuits); *accord* U.S. Br. 14 & n.4. Two courts, including the court of appeals below, have held to the contrary. *See* Pet. 8-9 (discussing Fifth and Seventh Circuit cases); *accord* U.S. Br. 14. The BIA has taken the majority view, and its rule governs removal proceedings in any circuit in which the court of appeals has yet to issue a controlling decision. *See* Pet. 11-12; *accord* U.S. Br. 14-15.

The importance of the question presented in this case, and the need to resolve the conflict on the question, has only become all the more apparent since the petition was filed. Since then, the Fifth Circuit, citing the decision below, has denied 19 petitions for review of BIA decisions applying circuit precedent on the issue.[1] The Seventh Circuit has also denied peti-

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[1] *See King v. Holder*, No. 08-60762, 2009 WL 3833776, at *1 (5th Cir. Nov. 17, 2009) (per curiam); *Ruiz v. Holder*, No. 08-60261, 2009 WL 3833979, at *1 (5th Cir. Nov. 17, 2009) (per curiam); *Spence v. Holder*, No. 09-60102, 2009 WL 3833621, at *1 (5th Cir. Nov. 17, 2009) (per curiam); *Bharti v. Holder*, No. 08-60387, 2009 WL 3816967, at *1 (5th Cir. Nov. 16, 2009) (per curiam); *Alexis v. Holder*, No. 08-60745, 2009 WL 3806069, at *1 (5th Cir. Nov. 13, 2009) (per curiam); *Stanley v. Holder*, No. 08-60424, 2009 WL 3780705, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Diaz-Saenz v. Holder*, No. 08-60108, 2009 WL 3780717, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *De Leon-Castro v. Holder*, No. 06-60451, 2009 WL 3780683, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Martinez-Valero v. Holder*, No. 08-60234, 2009 WL 3780708, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Laguna-Hernandez v. Holder*, No. 08-60477, 2009 WL 3786077, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Okechukwu Osuagwu v. Holder*, No. 08-60579, 2009 WL 3634432, at *1 (5th Cir. Nov. 4, 2009) (per curiam); *Douglas v. Holder*, No. 08-60318, 2009 WL 3614535, at *1 (5th Cir. Nov. 3, 2009) (per curiam); *Simpson v. Holder*, No. 08-60874, 2009 WL 3524929, at *1 (5th Cir. Oct. 30, 2009) (per curiam); *Ata v. Holder*, No. 08-60636, 2009 WL 3525739, at *1 (5th Cir. Oct. 29, 2009) (per curiam); *Straker v. Holder*, No. 07-60285, 2009 WL 3471916, at *1 (5th Cir. Oct. 26, 2009) (per curiam); *Esmaili v. Holder*, No. 09-60115, 2009 WL 3345768, at *1 (5th Cir. Oct. 19, 2009) (per curiam); *Mosqueda-Masiel v. Holder*, No. 08-60843, 2009 WL 3270926, at *2 (5th Cir. Oct. 13, 2009) (per curiam); *Young v. Holder*, No. 08-60278, 2009 WL 2998905, at *1 (5th Cir. Sept. 21, 2009) (per curiam); *Hathaway v. Holder*, No. 08-61064, 2009 WL 2971787, at *2 (5th Cir. Sept. 17, 2009) (per curiam).

tions in four cases, citing its circuit precedent.[2] Countless additional aliens will be subject to the Fifth Circuit (and Seventh Circuit) rule in BIA proceedings but lack the resources to pursue the matter even to the courts of appeals. *Cf. In re Orville Wayne Fisher*, No. A037 337 283, 2009 WL 773214 (B.I.A. Mar. 9, 2009) (alien proceeding pro se). And the uncertainty caused by the conflict among the circuits will continue to frustrate the ability of defense counsel and prosecutors to offer defendants charged with drug possession offenses meaningful advice concerning the immigration consequences of a guilty plea or conviction. *See* Pet. 14.

2. Departing from the view of the majority of circuits and the BIA, the Government argues that a person who has been convicted only of simple drug possession (a federal law misdemeanor) can nonetheless be deemed convicted of the aggravated felony of recidivist possession. While a full refutation of the government's argument can await briefing on the merits, it is notable that the Government does not quote—much less engage—the critical textual requirement that a permanent resident alien is subject to mandatory deportation only if he "has . . . been *convicted* of an aggravated felony," 8 U.S.C. § 1229b(a)(3) (emphasis added). A person "convicted" of simple possession in state court, with no finding or charge of recidivism, has "been convicted" of a federal law misdemeanor. 21 U.S.C. § 844(a). He has not been "convicted" of an "aggravated fel-

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[2] Order, *Rodriguez-Diaz v. Holder*, No. 08-3309, at 2 (7th Cir. Nov. 24, 2009); Order, *Beckford v. Holder*, No. 08-1355, at 2 (7th Cir. Nov. 24, 2009); Order, *Ramirez-Solis v. Holder*, No. 08-3497, at 2 (7th Cir. Nov. 24, 2009); Order, *Garbutt v. Holder*, No. 08-4188, 2009 WL 3634336, at *4 (7th Cir. Nov. 5, 2009).

ony." 8 U.S.C. § 1229b(a)(3). The Government nowhere explains how its position can be reconciled with the relevant statutory text.

Additionally, the Government does not dispute that its position logically would result in "a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a . . . Federal *felony* on the ground that the defendant had prior convictions that *could have been* [but were not] used as the basis for a recidivist enhancement." Pet. App. 27a (BIA opinion). That position would have far-reaching implications. As the Center for the Administration of Criminal Law explains, the vast majority of federal drug possession convictions under § 844(a) are for the misdemeanor offense, because "federal prosecutors virtually always exercise their discretion to decline a recidivist drug charge under 21 U.S.C. § 851." Br. for *Amicus Curiae* Center on the Administration of Criminal Law, at 4 (explaining that, "in 2007, only 3 defendants were convicted" of recidivist possession under § 851). The Government's position logically means that those misdemeanor convictions would be transformed into convictions for aggravated felonies, in direct conflict with the requirement under federal law that a person charged with simple drug possession can be subject to treatment as a felon due to recidivism only if the government initiates and demonstrates a recidivism charge in accordance with Section 851.

3. Although petitioner disagrees with the Government's position on the merits, the parties are in agreement that "the present case would serve as an appropriate vehicle for this Court to resolve the conflict in the immigration context." U.S. Br. 16. Petitioner came to the United States at a very young

age, after which he became a lawful permanent resident. His fiancée is a United States citizen, with whom he has four children who are also United States citizens. The court of appeals held that petitioner was subject to mandatory deportation because he had been convicted for simple possession of one tablet of Xanax for which he lacked a prescription. The interpretation adopted by a majority of circuits and the BIA, in contrast, would permit him to seek discretionary relief from deportation that, if granted, would allow him to live in the United States with his family. *See* Pet. 16-17. This Court should grant the petition to resolve that conflict, and should reverse the decision below.

CONCLUSION

For the foregoing reasons and those stated in the petition and the brief of the United States, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 25, 2009

AMICUS CURIAE BRIEF

No. 09-60

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In The

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR AMICUS CURIAE CENTER FOR COURT INNOVATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The split among the courts of appeals over the proper application of the "aggravated felony" label to individuals with more than one simple drug possession offense has broad significance for noncitizens, their families and communities, and the courts that focus on breaking the cycle of drug addiction and crime. Increasingly the criminal justice system has turned to drug courts and other court-involved drug treatment programs as a problem-solving solution to drug addiction and crime. Individuals charged with drug offenses now have the opportunity to participate in drug treatment and, if successful, earn a reduction or dismissal of the charges against them. The question and uncertainty over whether noncitizens with a prior drug possession conviction who successfully complete drug treatment are nonetheless subject to mandatory deportation as "aggravated felons" has created a host of difficulties for the administration of these court programs in communities with immigrant populations. Amicus submits this brief to urge the Court to resolve this issue.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amicus states that no counsel for a party authored any part of the brief, and no person or entity other than amicus and their counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

Amicus the **Center for Court Innovation** is a non-profit, non-partisan organization dedicated to helping courts and criminal justice agencies reduce crime and improve public confidence in the justice system. Through demonstration projects, expert research, training, and technical assistance, the Center works with jurisdictions throughout the United States to implement problem-solving initiatives. Since the Center's founding, it has been actively engaged in studying and promoting the development of drug courts across the country.

SUMMARY OF ARGUMENT

The circuit split in this case raises the question of whether a person who has more than one simple drug possession offense should be automatically labeled as having an "aggravated felony" conviction under 8 U.S.C. § 1101(a)(43)(B). The Board of Immigration Appeals (BIA) has taken the position that such an individual should not be labeled as an aggravated felon unless the person was convicted as a recidivist – and therefore the equivalent of a federal felon – in the actual criminal proceeding.[2] Four circuits have reached the same conclusion, but two circuits – the Fifth and the Seventh – hold that anyone with more than one simple drug possession offense, regardless of

[2] *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (en banc).

whether he or she was treated as a recidivist in the criminal case, is an aggravated felon and thus barred from seeking discretionary relief from deportation from an immigration judge or becoming a citizen.[3]

Amicus urges the Court to resolve the circuit split on this issue for two reasons. First, this issue has a profound impact on courts' work with noncitizens with a prior drug possession conviction who seek to or have overcome drug addiction through drug court programs. The standard drug court procedure requires participants to plead guilty or admit facts sufficient for a conviction but offers participants who successfully complete drug treatment a reduction or dismissal of the charges against them. Noncitizens who successfully participate in drug treatment court programs are generally still

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[3] *Compare Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (holding that, in order to be deemed to have been convicted of an aggravated felony based on having more than one drug possession conviction, a noncitizen must have been convicted of a *recidivist* drug offense in his or her criminal proceeding), *and Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008) (same), *and Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006) (same), *and Steele v. Blackmun*, 236 F.3d 130 (3d Cir. 2001) (same), *with Carachuri v. Holder*, 570 F.3d 263 (5th Cir. 2009) (holding that a noncitizen who is convicted of a drug possession offense following any prior final drug possession conviction will automatically be deemed to have been convicted of an aggravated felony even when he or she was not convicted of a recidivist drug offense in his or her criminal proceeding), *and Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (same), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009).

deemed to be deportable as having a controlled substance "conviction" under immigration law, but would be able to seek discretionary relief from deportation. Normally, evidence of successful rehabilitation would be a positive factor for an immigration benefit or relief from deportation. However, being labeled an aggravated felon changes the calculus because it prevents a noncitizen with a prior drug possession conviction from even being considered for discretionary relief from deportation and subjects him or her to numerous other consequences, including a permanent bar to naturalization. This paradoxical result puts the criminal court system in the difficult position of trying to encourage noncitizens to participate in and complete drug court programs despite the fact that even successful participation may result in their mandatory deportation. It fundamentally changes the incentive structure that makes drug courts effective in breaking the cycle of drug addiction and crime, a goal important to the participants, their families and communities, and local, state, and federal government.

Second, the uncertainty resulting from the circuit split over this issue has made it difficult, if not impossible, for courts to advise noncitizen participants of the consequences of their participation in drug court programs. Noncitizens with virtually any type of drug possession conviction may be detained and placed in removal proceedings anywhere in the country. If they end up in removal proceedings within

the Fifth or Seventh Circuits, successful drug court participants who have any prior drug possession conviction face mandatory deportation with no consideration given to their rehabilitation. If they end up outside the Fifth or Seventh Circuits, successful drug court participants will be able to provide evidence of their rehabilitation to an immigration judge, who will in turn be able to make a decision about whether to grant discretionary relief from removal. The stark differences between the potential outcomes for successful participants in drug court programs makes the uncertainty over this issue particularly difficult for courts who seek to utilize these innovative programs.

Given the importance of this issue to the effectiveness of criminal courts' drug treatment initiatives and the uncertainty that the circuit split engenders for courts' work with noncitizens, amicus urges this Court to grant certiorari in this case.

BACKGROUND

The issue in this case affects people who have faced or will face simple drug possession charges after any prior such conviction. The criminal justice system has long struggled with how to break the cycle of drug crimes. The resolution of this case is likely to affect the implementation and accessibility of one rapidly expanding and effective solution – drug courts – for noncitizens.

Over the last two decades, drug courts have developed as an innovative response to the failure of traditional criminal justice solutions to curb the incidence of drug crime.[4] In order to improve public safety, federal and state governments have increasingly recognized the need for programs that confront the addiction underlying many drug possession offenses. The drug courts that have emerged are the result of the coordinated efforts of the judiciary, prosecution, defense bar, probation, law enforcement, treatment, mental health, and social services to intervene and break the cycle of drug abuse, addiction, and crime.[5]

Under the standard drug court model, defendants are offered an opportunity for regimented drug treatment in lieu of the typical punitive sanctions and incarceration associated with drug offenses. Courts closely monitor defendants' progress in treatment and use a series of legal incentives to compel successful completion of the program. If the defendant successfully completes treatment, the drug court may vacate any plea and reduce or dismiss the charges against him or her.[6] Such a result is a win-win for the parties in the criminal case and the community as a whole.

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[4] *See* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, DRUG COURTS: THE SECOND DECADE 1 (June 2006).

[5] *See id.*

[6] *See id.* at 2.

The first drug court was established in Dade County, Florida in 1989.[7] Since then, drug courts have spread across the country. Currently, there are a total of 2,140 drug courts in the United States and another 284 in the planning stages.[8] This represents a thirty-two percent increase since 2004.[9] Drug courts operate or are being planned in each of the fifty states, the District of Columbia, Puerto Rico, Guam, Northern Mariana Islands, two Federal Districts, and more than seventy tribal locations across the United States.[10]

The rapid expansion of the drug court model has been fueled by studies confirming the effectiveness of the program. In 2005, the U.S. Government Accountability Office conducted a comprehensive survey of the effectiveness of drug courts and found evidence of consistent reductions in the incidence of new arrests and convictions for drug court participants.[11] A series

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[7] John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, *in* THE EARLY DRUG COURTS 19, 22 (W. Clinton Terry, III ed., 1999).

[8] OFFICE OF NATIONAL DRUG CONTROL POLICY, DRUG COURTS, http://www.whitehousedrugpolicy.gov/enforce/DrugCourt.html (last visited Aug. 10, 2009).

[9] C. WEST HUDDLESTON, III ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 1 (2008).

[10] OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 8.

[11] U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. 05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (2005).

of recent evaluations have reached the same conclusions.[12] For example, a multi-site study by the Center for Court Innovation found that drug courts in New York State generated significant offense reduction for participants over a three-year post-arrest period compared with similar non-participating defendants.[13] Offense reduction was most pronounced for graduates of drug court programs.[14] Other research has also indicated that drug courts may be particularly effective for participants with prior possession convictions – a circumstance not uncommon for people who suffer from addiction and would most benefit from treatment.[15] Moreover, studies confirm that drug

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[12] *See* HUDDLESTON, *supra* note 9, at 6, 8 (summarizing studies of the effectiveness of drug courts in various jurisdictions).

[13] MICHEL REMPEL ET AL., CENTER FOR COURT INNOVATION, THE NEW YORK STATE DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS x (2003) (reporting a twenty-nine percent recidivism reduction over a three-year post-arrest period and an average thirty-two percent reduction over a one-year post-program period when compared with cases processed in conventional courts).

[14] REMPEL ET AL., *supra* note 13, at xi.

[15] AMANDA B. CISSNER & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND 'DO THEY WORK?' 14 (2005) (noting research indicates that drug courts may be more effective in reducing the likelihood of re-offending for participants with a prior criminal record than for those who have committed first-time offenses).

courts produce these positive results with significant cost-savings for local, state, and federal government.[16]

For these reasons, the federal government has strongly endorsed the drug court model. The Obama Administration has requested $58.9 million in federal funding for drug courts for fiscal year 2010, a $35 million increase from the previous fiscal year.[17] This comports with President Obama's stated commitment to "ensure that states have the resources to support existing drug courts, which have been proven successful in dealing with non-violent offenders" and to "replicate these efforts within the federal criminal justice system."[18] The U.S. Department of Justice has championed the drug court model. Noting the impact of drug courts in New York State, U.S. Attorney General Eric Holder, Jr. recently proclaimed the importance of promoting drug courts as effective drug policy:

> One promising, viable solution to the devastating effect of drugs on the criminal

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[16] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 7 (noting that benefits exceeded costs by a range of $1,000-$15,000 per participant in the drug courts studied).

[17] OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: FY2010 BUDGET SUMMARY 4 (May 2009).

[18] THE PARTNERSHIP FOR A DRUG-FREE AMERICA, PRESIDENTIAL CANDIDATES WEIGH IN: RESPONSE OF SENATOR BARACK OBAMA (Dec. 13, 2007), http://www.drugfree.org/Portal/DrugIssue/Features/Presidential_Candidates_Weigh_In (last visited Aug. 10, 2009).

> justice system and on American communities is the implementation of more drug treatment courts. Drug court programs provide an alternative to incarceration for non-violent offenders by focusing on treatment of their underlying addiction. Program participants are placed in treatment and routinely tested for drug use – with the imposition of immediate sanctions for positive tests balanced with suitable incentives to encourage abstinence from drug use. These programs give no one a free pass. They are strict and can be extraordinarily difficult to get through. But for those who succeed, there is the real prospect of a productive future.[19]

This goal of having a "real prospect of a productive future" is one shared by participants in drug court programs in communities across the country – including communities with high immigrant populations. Drug courts are open to both citizens and noncitizens with legal status.[20] As of 2007, there were 12.8 million lawful permanent

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[19] U.S. ATTORNEY GENERAL ERIC HOLDER, JR., REMARKS AS PREPARED FOR DELIVERY BY ATTORNEY GENERAL ERIC HOLDER AT THE VERA INSTITUTE OF JUSTICE'S THIRD ANNUAL JUSTICE ADDRESS (July 9, 2009), http://www.usdoj.gov/ag/speeches/2009/ag-speech-090709.html (last visited Aug. 10, 2009).

[20] Some drug court programs may require direct proof of status to establish participants' ability to arrange for payment for treatment, which typically involves Medicaid coverage. Medicaid coverage is limited to "qualified aliens" with legal status. *See* 8 U.S.C. §§ 1611, 1621.

residents living in the United States.[21] While there are no statistics of the number of permanent residents enrolled in drug court programs, a significant number of noncitizens face deportation for drug offenses.[22] Many drug courts have worked with noncitizens who seek treatment, particularly in states with high noncitizen populations.[23]

The drug court model, with its proven results, is changing the way that traditional court systems are handling drug possession crimes. Its effectiveness and accessibility for noncitizens is an issue of significant importance to amicus and the courts with which it works throughout the United States.

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[21] NANCY R. RYTINE, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, ESTIMATES OF LEGAL PERMANENT RESIDENT POPULATION IN 2007 1 (2007).

[22] *See* HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 32 (April 2009) (reporting that the United States has deported at least 122,180 noncitizens based on nonviolent drug offenses between 1997 and 2007).

[23] *See* Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIMINAL JUSTICE REVIEW 308, 309 (2008) (noting that the immigration consequences of participation in problem-solving court programs may pose a significant issue for courts in states with high noncitizen populations).

REASONS FOR GRANTING THE WRIT

I. RESOLUTION OF THE CIRCUIT SPLIT IN THIS CASE IS WARRANTED BECAUSE IT ADDRESSES AN ISSUE THAT IMPACTS THE EFFECTIVENESS OF THE DRUG COURT MODEL FOR NONCITIZENS WHO SEEK DRUG TREATMENT.

The resolution of the question of whether a successful drug court participant with a prior simple drug possession conviction must automatically be labeled an "aggravated felon" will fundamentally affect drug courts' ability to serve as an effective and cost-efficient means to address drug use by non-citizens and to positively impact immigrant families and communities. An interpretation that results in the mandatory deportation of successful graduates of drug court programs who have prior simple possession dispositions undermines the incentive for noncitizens to participate in these programs.

A. Resolution Of The Split Will Determine Whether Noncitizens With Prior Drug Possession Convictions Who Have Successfully Completed Drug Treatment Programs Are Barred From Seeking Discretionary Relief From Removal And Applying For Naturalization.

Virtually all noncitizens who participate successfully in drug court programs are deportable. The critical issue is whether the aggravated felony

definition is read so broadly as to deny all noncitizen drug court participants with prior simple drug possession convictions any possibility of discretionary relief from deportation or naturalization.

The drug court model typically requires a defendant to plead guilty to the initial charges.[24] Upon successful completion of treatment, the drug court may reduce or dismiss the charges against the defendant.[25] The Board of Immigration Appeals typically considers such a provisional plea, even if vacated after successful treatment, to constitute a "conviction" for purposes of immigration law.[26] Thus a

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[24] While some drug courts permit participants to enter treatment without a guilty plea, the majority of drug courts currently require a guilty plea upfront. *See* HUDDLESTON, *supra* note 9, at 4-5.

[25] *See* NATIONAL INSTITUTE OF JUSTICE, *supra* note 4, at 2.

[26] *See* 8 U.S.C. § 1101(a)(48)(A) (defining a "conviction" as "a formal judgment of guilt of the alien entered by a court" or, "if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed"); *Matter of Roldan-Santoyo*, 22 I&N Dec. 224 (BIA 1999) (holding that a noncitizen who pleads guilty to a drug offense but later receives an expungment pursuant to a deferred adjudication program will be deemed to have a "conviction" under 8 U.S.C. § 1101(a)(48)(A)). *But see Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that a noncitizen who receives an expungment of his first-time simple drug possession offense pursuant to a state rehabilitative statute does not have a "conviction" because his or her offense would have qualified for treatment under the Federal First Offender Act). The Board

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participant in drug court is likely to be considered deportable and face other immigration consequences associated with having drug possession offenses.[27] Moreover, virtually any individual with a prior simple drug possession conviction is, of course, already deportable for that offense.[28] The question presented in this case is whether noncitizens with more than one such simple drug possession offense are also subject to being classified as having an "aggravated felony" conviction – barring immigration judges from exercising judicial discretion.

Congress has created a graduated scheme of immigration consequences for drug offenses, allowing immigration judges to decide whether to grant certain noncitizens with drug convictions forms of relief such as cancellation of removal, asylum, or other waivers if they can prove sufficient positive

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of Immigration Appeals does not follow *Lujan-Armendariz* outside the Ninth Circuit. *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (en banc).

[27] 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."); *see also* 8 U.S.C. § 1227(a)(2)(B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

[28] 8 U.S.C. § 1227(a)(2)(B)(i).

equities or threat of persecution upon deportation.[29] The existence of these forms of relief provides noncitizens charged with drug offenses a strong incentive to complete drug treatment. Noncitizens' successful completion of rehabilitation programs leaves open the possibility of obtaining discretionary relief by showing an immigration judge that they have overcome addiction and deserve to remain in the United States with their families.[30] The question of whether a noncitizen with a prior drug possession conviction will be deemed mandatorily deportable after successfully completing drug treatment is therefore a critical issue for drug courts.

Similarly, the case implicates the issue of whether noncitizens with prior simple drug possession convictions who have already successfully completed drug court programs are eligible for naturalization. In addition to state criminal conviction information, the application for naturalization requires applicants to state whether they have ever been "placed in an alternative sentencing or rehabilitative program (for example: diversion,

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[29] *See, e.g.*, 8 U.S.C. § 1229b(a) (listing requirements for cancellation of removal for lawful permanent residents); 8 U.S.C. § 1158 (listing requirements for asylum).

[30] *See Matter of C-V-T*, 22 I&N Dec. 7, 12 (BIA 1998) (explaining that, in addition to other evidence of positive equities meriting cancellation of removal, "a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion").

deferred prosecution, withheld adjudication, deferred adjudication)."[31] This question elicits information about dispositions such as those provided by drug courts. In circuits that interpret the aggravated felony label to apply to anyone with more than one simple possession disposition, even longtime legal permanent residents who have successfully completed drug treatment will face not only automatic denial of their citizenship application but will also be subject to referral for mandatory deportation.[32]

The aggravated felony label is the most severe of the graduated sanctions Congress created for drug offenses, and one that would harshly affect successful participants in drug court. Successful drug court participants are already deportable because of their simple possession offenses – this case is about whether the law further requires the elimination of all judicial discretion in those deportation proceedings. Such an interpretation would bind the hands of immigration judges, mandating that noncitizens who have overcome their addictions as a result of drug treatment courts be deported despite their rehabilitation.

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[31] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEP'T OF HOMELAND SECURITY, N-400 APPLICATION FOR NATURALIZATION (2009), http://www.uscis.gov/files/form/N-400.pdf (last visited Aug. 10, 2009).

[32] 8 U.S.C. §§ 1101(f) (stating that a person who has been convicted of an aggravated felony is permanently barred from establishing "good moral character"), 1427(a) (requiring "good moral character" as a requirement for naturalization).

B. Resolution Of The Split Will Determine Whether Drug Courts May Remain Effective As A Tool To Promote Participation In And Completion Of Drug Treatment For Noncitizens With Prior Drug Possession Convictions.

Given the severe consequences that attach to an "aggravated felony" conviction, the resolution of this case will determine whether drug courts are able to effectively serve noncitizens with prior simple possession convictions who seek treatment. Drug courts operate on an incentive model, using the coercive leverage of the criminal justice system to encourage individuals to participate in and complete drug treatment programs. An interpretation that labels any noncitizen with more than one prior possession disposition who successfully completes drug treatment an aggravated felon, therefore mandating their deportation without consideration of positive equities, eviscerates the incentives necessary for the drug court model to work effectively.

Though the scope and nature of drug courts vary from jurisdiction to jurisdiction, all share certain common elements and reflect recognition that the coercive leverage of the criminal justice system is a powerful tool to promote participation in and compliance with treatment.[33] Under the standard

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[33] *See* NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997) (describing common elements of the drug court model).

drug court model, defendants are first screened for eligibility based on their criminal history, eligibility for drug treatment, and current case information.[34] Most drug court programs are reserved for defendants charged with drug possession or other nonviolent offenses.[35] Most drug court programs are not accessible to defendants charged with drug trafficking crimes.[36]

Eligible defendants must decide whether to participate in drug court, thereby foregoing the traditional criminal court process of adversarial plea bargaining or trial. In the traditional criminal court system, defendants focus on seeking a favorable plea bargain with the prosecutor or taking their case to trial in an adversarial context. In drug courts, the prosecutor and defense counsel are encouraged to "shed their traditional adversarial courtroom relationship and work as a team," such that "the team's focus is on the participant's recovery and

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[34] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 37-38.

[35] Any drug court program that allows participation by either current or past violent offenders cannot receive federal grants administered under Title II of the 21st Century Department of Justice Appropriations Authorization Act. 42 U.S.C. § 3797u-1. *See* 42 U.S.C. § 3797u-2 (defining "violent offender").

[36] *See* STEVEN BELENKO & TAMARA DUMANOVSKY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, Pub. No. NCJ-144531 PROGRAM BRIEF: SPECIAL DRUG COURTS 5 (1993) (noting that many drug courts handle only drug possession cases).

law-abiding behavior – not on the merits of the pending case."[37] Rather than challenge guilt or seek a lesser plea bargain, defendants in drug court are typically required to plead guilty to the charges at the outset.[38] Instead of incarceration, the defendant then enters into treatment, which typically lasts at least twelve months, and may be inpatient or outpatient, while the drug court closely monitors his or her progress.[39] If the defendant fails to complete treatment, the drug court may impose sanctions or sentence him or her according to the initial plea. If the defendant successfully completes treatment, however, the drug court may vacate the plea and reduce or dismiss the charges against him or her.[40]

Participation in drug courts thus involves the potential for high reward to the defendant. A successful defendant has the opportunity to reintegrate back into society with evidence of rehabilitation and avoids receiving an additional conviction on his or her criminal record. An unsuccessful defendant, however, may receive a higher sentence on his or her initial plea in drug court than he or she might if he or she opted for trial or plea-bargaining. Indeed, drug courts use the "carrot" of the reduction or dismissal of charges, with the "stick" of incarceration and other

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[37] BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 3 (2004).

[38] HUDDLESTON, *supra* note 9, at 4-5.

[39] *See* U.S. GOV'T ACCOUNTABILITY, *supra* note 11, at 3.

[40] *See* NATIONAL INSTITUTE OF JUSTICE, *supra* note 4, at 2.

sanctions, to motivate the completion of treatment. The coercive power of the court contributes to the success of the drug court model.[41] The model does not work without both the carrot and the stick.

An interpretation that labels any noncitizen with a prior simple drug possession conviction who successful completes drug treatment as an "aggravated felon" removes the "carrot" of eligibility for discretionary relief from deportation, leaving only the "stick" of punishment. For noncitizens who have only one prior simple drug possession conviction, participation in drug treatment court – due to the provisional plea – may be precisely what deems them to be an aggravated felon. There is no incentive for them to participate, and every incentive to opt for trial or a plea to a nondrug offense. For noncitizens who already have more than one prior simple drug possession conviction, participation in drug treatment court will not make them any more or less of an aggravated felon, but the benefits of drug treatment – proof of rehabilitation – are undermined because an

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[41] *See, e.g., id.* at 1 ("By providing a structure that links supervision and treatment, drug courts exert legal pressure on defendants to enter and remain in treatment long enough to realize benefits. More than two-thirds of participants who begin treatment through a drug court complete it in a year or more – a six-fold increase in retention compared with programs outside the justice system."); CISSNER & REMPEL, *supra* note 15, at 4-5 (2005) (noting that retention rates of drug court programs are believed to be higher than treatment programs outside the court system due to courts' use of incentives and legal pressure to coerce compliance by defendants).

immigration judge cannot consider any such positive equities. This counterintuitive result – that an immigration judge cannot consider rehabilitation, the very equity that would otherwise be of paramount importance to the exercise of judicial discretion in a deportation case – undermines the incentive structure of the drug court model as well as the fairness of the deportation system.

An interpretation that reaches the opposite result – in line with the reasoned opinion of the Board of Immigration Appeals and the First, Second, Third, and Sixth Circuits – keeps the incentive structure of the drug court model in place and maintains fairness in the deportation system. Successful noncitizen drug court participants emerge from the programs rehabilitated, have avoided jail time and an additional conviction on their state criminal records, and are able to remain with their families and build positive equities to demonstrate in their deportation case. Provided that over five years have passed since the offense, noncitizens who successfully complete drug court programs may be granted U.S. citizenship. The benefits to the individual are significant – because judicial discretion is preserved and mandatory deportation is not the inevitable result.

These benefits also extend beyond the individual to the families and communities of noncitizens. By promoting sobriety and law-abiding behavior, drug courts have the potential to strengthen families and make a profound impact on the health of our society as a whole. Nearly two-thirds of drug court

participants are parents.[42] Many noncitizen drug offenders have U.S. citizen children and/or spouses whose lives are immeasurably changed for the better when their noncitizen family member completes drug treatment and overcomes his or her substance abuse problem. Drug courts provide a strong incentive for noncitizens with substance abuse issues to complete a rigorous rehabilitation program, and therefore serve the interests of U.S. citizen children and other family members.

Expansion of the "aggravated felony" term to include anyone with more than one simple possession offense will therefore eliminate many of the positive benefits of drug courts by dramatically curtailing the ability of state criminal justice systems to channel noncitizens into treatment programs and unfairly punishing noncitizens who have successfully completed drug treatment and now lead healthy, stable lives. Amicus respectfully requests that the Court grant certiorari in this case to resolve this important issue for the courts.

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[42] DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS 8 (1998).

II. RESOLUTION OF THE CIRCUIT SPLIT IN THIS CASE IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE ABILITY OF DRUG COURTS TO ADVISE NON-CITIZEN PARTICIPANTS WITH PRIOR DRUG POSSESSION CONVICTIONS OF THE CONSEQUENCES OF SUCCESSFUL COMPLETION OF DRUG TREATMENT PROGRAMS.

The resolution of the circuit split is also necessary because the uncertainty over the interpretation at issue renders drug courts unable to advise noncitizen participants with prior drug possession convictions of the consequences of their successful participation. The Board of Immigration Appeals has adopted a rule that does not automatically treat a second simple drug possession offense as an aggravated felony.[43] This rule applies unless there is contrary, binding circuit law.[44] Currently, only the Fifth and Seventh Circuits have contrary law.[45] Unfortunately, many individuals are detained in those circuits and a drug court will have no way of determining whether one of its participants will be subject to favorable or unfavorable law due to the

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[43] *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (en banc).

[44] *Id.* at 394.

[45] *Carachuri v. Holder*, 570 F.3d 263 (5th Cir. 2009); *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009).

Government's method of detention and transfers of immigrants in removal proceedings. This uncertainty prevents drug courts from assessing the effectiveness of their programming for noncitizens and advising potential participants about the consequences of their participation.

Most noncitizens in removal proceedings may be detained, and virtually any noncitizen with a controlled substance conviction who has spent any time in jail, including an arrest, after October 8, 1998 will be considered to be subject to mandatory, no-bond detention for the duration of his or her proceedings.[46] The Government may detain a noncitizen in an immigration detention facility anywhere in the country, where the noncitizen will be required to appear before an immigration judge. The immigration judge must follow the law of the circuit that binds the immigration court, and not the law that applies where the noncitizen lives or where he or she received his or her dispositions.[47]

The split in the circuits on whether a person with more than one simple possession offense is an aggravated felon thus makes it difficult, if not impossible, for a drug court to advise a potential

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[46] 8 U.S.C. § 1226(c) (listing grounds for mandatory detention); *Matter of West*, 22 I&N Dec. 1405 (BIA 2000) (interpreting the scope of the mandatory detention statute).

[47] 8 U.S.C. § 1252(b)(2) (providing for circuit review based on "the judicial circuit in which the immigration judge completed the proceedings").

noncitizen participant of the consequences of his or her participation. A lawful permanent resident who lives in New York, received a drug possession conviction in New York, and then has the opportunity to pursue drug treatment through a New York drug court, may be picked up and detained in a facility within the jurisdiction of the Second Circuit – such as Varick Street Detention Facility in New York or the Bergen County Jail in New Jersey, both under the jurisdiction of the Varick Immigration Court. If that happens, he will be subject to Second Circuit law, which will not deem his drug possession offenses to be aggravated felonies.[48] He may file for cancellation of removal or asylum, and may later apply for naturalization. If he is transferred to a facility in Texas, such as Port Isabel Detention Center, he will be subject to Fifth Circuit law, which will deem his drug possession offenses to be aggravated felonies.[49] He will be barred from seeking any relief. This latter, harsher result is not unlikely – a recent response to an Associated Press Freedom of Information Act request revealed that twenty-nine percent of immigrant detainees from around the country are held in detention facilities within the Fifth Circuit.[50]

This creates a significant dilemma for drug courts as they cannot properly advise noncitizen

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[48] *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008).

[49] *Carachuri v. Holder*, 570 F.3d 263 (5th Cir. 2009).

[50] U.S. DEP'T OF HOMELAND SECURITY, RESPONSE TO FOIA CASE NO. 09-FOIA-1243 (Feb. 6, 2009) (on file with counsel).

participants on the consequences of their participation in drug treatment. For noncitizens whose removal cases occur outside the Fifth and Seventh Circuits, participation in drug treatment will be a strong benefit to their immigration case because it will permit them to establish rehabilitation and positive equities necessary for relief from removal or an application for naturalization. By contrast, for noncitizens whose removal cases occur in the Fifth and Seventh Circuits, participation in drug treatment may make them worse off. Noncitizens who have only one prior simple drug possession conviction will need to be advised that participation in drug treatment – due to the provisional plea – will be enough to deem them an aggravated felon if they are transferred to the Fifth or Seventh Circuits. Those who already have more than one prior simple drug possession disposition will need to be advised that their successful participation in drug treatment cannot change the outcome of a removal proceeding if they are transferred to one of those circuits because an immigration judge will be unable to consider any equities in their case. These complex consequences and the uncertainty of the applicable law make it difficult, if not impossible, for drug courts to advise noncitizen participants of the consequences of their participation in and completion of drug treatment.

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the petition for the writ of certiorari should be granted.

Dated: August 17, 2009
New York, NY

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,

Petitioner,

—v.—

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law ("the Center"), respectfully submits this brief in support of Petitioner Jose Angel Carachuri-Rosendo.[1] The Center, based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy, and particularly focuses on prosecutorial power and discretion. In general, the Center's litigation practice concentrates on cases in which exercises of prosecutorial discretion raise significant substantive legal issues. A primary guiding principle in selecting cases to litigate is to identify cases in which prosecutors exercised discretion to engage in overaggressive or unwarranted interpretations of the Constitution, statutes, regulations, or policies in a way that diverges from standard practices, raises fundamental questions of defendants' rights, or is a misuse of government resources in light of law enforcement priorities. The Center also defends exercises of prosecutorial discretion where the discretionary decisions comport with applicable law

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[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the Center or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

and standard practices and are consistent with law enforcement priorities.

The Center's appearance as *amicus curiae* here is prompted by its concern that allowing immigration courts to supplant prosecutorial discretion exercised in a measured and consistent manner will undermine the fair and efficient administration of the criminal justice system. Thus, this case is an important one to the Center's mission.

SUMMARY OF ARGUMENT

This Court should grant the petition for *certiorari* to resolve the circuit split on an important question of law that goes to the heart of the fair and efficient administration of the criminal justice system: whether an individual can be found to be an aggravated felon for purposes of the immigration laws in the absence of being actually convicted as a recidivist in the underlying state criminal proceeding.[2] The decisions of the Fifth and Seventh Circuits, unlike those of the First, Second, Third, and Sixth Circuits and the Board of Immigration Appeals, permit immigration courts to treat a second or subsequent possession misdemeanor offense as a recidivist felony despite a state prosecutor's choice to decline such a charge.[3] In so holding, the Fifth and

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[2] The same issue is raised in *Escobar v. Holder*, No. 09-__ (petition for *certiorari* filed August 17, 2009).

[3] *Compare Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008), *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008), *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), *and In re Carachuri-Rosendo*,

Seventh Circuits' decisions contravene the considered charging decisions of state prosecutors acting consistently with the broad discretion afforded them under the law. *Amicus* urges this Court to grant the writ for three principal reasons.

First, this Court should grant *certiorari* because the Fifth Circuit's disregard for the exercise of prosecutorial discretion ignores this Court's recognition that "the decision to prosecute is particularly ill-suited to judicial review," because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Such judicial disregard of the proper exercise of prosecutorial discretion violates basic policy imperatives. Because prosecutorial discretion plays a crucial role in the interplay between prosecutors, courts, and legislatures to ensure fair and equitable application of the criminal laws, interfering with such discretion prevents the appropriate actors in the criminal justice system from ensuring that charges and sentences are tailored to the circumstances of the particular individual. Indeed, state and federal legislatures often design punishment schemes to account for the

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24 I. & N. Dec. 382, 393 (BIA 2007), *with Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) *and Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008).

exercise of prosecutorial discretion, recognizing that such exercise will mitigate what otherwise could be unduly harsh punishments. Further, encroaching upon prosecutorial discretion creates uncertainty about the consequences of convictions, undermining prosecutors' ability to secure plea dispositions. Countermanding prosecutorial discretion also compromises prosecutors' ability to secure cooperation of offenders necessary for the disposal of cases, thereby impeding the proper punishment of the most culpable offenders.

Second, this Court should grant *certiorari* in order to address not only the basic disrespect afforded the states' administration of their criminal justice systems inherent in the decision of the Fifth Circuit, but also the unwarranted disparity created between defendants convicted in state versus federal courts. When a federal immigration court interferes with the administration of state criminal justice systems in this fashion, it upsets the appropriate balance between state and federal interests. Because states play a primary role in defining and enforcing their criminal laws, and state prosecutors bring the vast majority of criminal prosecutions in the United States, encroaching upon state prosecutors' charging decisions while leaving similar decisions of federal prosecutors undisturbed not only demonstrates disrespect for state actors, but has far reaching implications for the criminal justice system. Indeed, in practice, federal prosecutors virtually always exercise their discretion to decline a recidivist drug charge under 21 U.S.C. § 851—in 2007, only 3 defendants were convicted under this provision. Allowing an immigration court to

disregard completely a state prosecutor's decision similarly to decline a recidivist charge would create a vast and very real disparity in the treatment of state and federal offenders.

Finally, this Court should grant *certiorari* because the scheme set forth by the Fifth Circuit creates the risk that a defendant's Sixth Amendment right to a jury trial may be violated depending upon where removal proceedings are initiated.

Given the importance of these issues to the fairness and equity of the criminal justice system and the uncertainty that the circuit split engenders for that system, *amicus* urges this Court to grant *certiorari* in this case.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant *Certiorari* Because the Fifth Circuit's Decision Improperly Interferes with the Basic Exercise of Prosecutorial Discretion with Respect to Charging Decisions.

As this Court has recognized, prosecutorial discretion "is an integral feature of the criminal justice system," *United States v. LaBonte*, 520 U.S. 751, 762 (1997), and "[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion," *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). "This broad discretion rests largely on the recognition that the

decision to prosecute is particularly ill-suited to judicial review," because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict ... [is] a decision which has long been regarded as the special province of the Executive Branch ....").

The Fifth Circuit's decision fundamentally contravenes this integral feature of the criminal justice system by allowing immigration courts to supplant, without any reasoned basis, the considered charging decisions of prosecutors acting within the proper discretion afforded them under the law. If left standing, the decision not only would undermine the vital role prosecutorial discretion plays in ensuring the fair and efficient administration of the criminal justice system, but also would result in a system that ignores the explicit role that discretion plays in the specific statutory scheme at issue.

A. The Prosecutor's Exercise of Discretion Is a Critical Tool Used To Achieve Important Policy Goals and Should Not Be Undermined.

The decision of the Court of Appeals would allow immigration judges—who lack the requisite knowledge of the facts and circumstances that

inform the decisions of the prosecutor, plea allocution judge, and sentencing judge—to interpose their judgment in contravention of the considered collective judgment of the myriad players in the criminal justice system. As the Board of Immigration Appeals ("BIA") itself cautioned in Petitioner's proceedings, "the hypothetical approach would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that could have been prosecuted as a Federal felony." *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (BIA 2007). Such interference disturbs the efficient and fair administration of the criminal justice system: *first*, by contravening prosecutors' proper role in ensuring the equitable enforcement of the criminal laws through the exercise of their charging discretion, which is particularly important in the context of recidivism cases; *second*, by creating uncertainty about the consequences of convictions and thus undermining prosecutors' critical ability to secure plea dispositions; and *finally*, by compromising prosecutors' ability to secure cooperation of witnesses to ensure the proper punishment of the most culpable offenders.

First, the exercise of prosecutorial discretion is a key mechanism by which punishment is calibrated to fit the characteristics of the specific offense and offender. This Court has recognized that legislatures face "practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently

specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). As a result, many criminal offenses are enumerated in "statutes that are ill-defined, overbroad, or insufficiently concerned with culpability," while other offenses are found within "[s]tatutes prohibiting appallingly destructive conduct [that] are jumbled together with others prohibiting relatively minor violations of social mores." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2137 (1998). Given this reality, prosecutorial discretion, particularly in favor of leniency, "is widely seen as necessary, and frequently as a good thing: It permits mercy, and it avoids flooding the system with low-level crimes." William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000). Indeed, because "[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case," "'leniency' has therefore become not merely common but a systemic imperative." SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 1006 (8th ed. 2007).

For example, the U.S. Attorney's Manual requires prosecutors to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," with the significant caveat that "the attorney for the government consider, *inter alia*, such factors as the Sentencing Guideline range yielded by the charge, [and] whether the penalty yielded ... is proportional to the seriousness of the defendant's conduct ...." U.S. Attorney's Manual,

PRINCIPLES OF FEDERAL PROSECUTION § 9-27.300 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (hereinafter "U.S. Attorney's Manual"). The ABA has similarly observed that

> [d]ifferences in the circumstances under which a crime took place, the motives behind or pressures upon the defendant, mitigating factors in the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-3.9(b) cmt. (3d ed. 1993) (hereinafter "ABA STANDARDS").

Many state statutory schemes expressly contemplate the use of prosecutorial discretion related to charging decisions. For example, under Colorado law, prosecutors are provided broad discretion to pursue appropriate dispositions through plea agreements, including to "seek or not to oppose the dismissal of an offense charged if the defendant enters a plea of guilty or *nolo contendere* ... to another offense reasonably related to the defendant's conduct," COLO. REV. STAT. § 16-7-301(2)(b), or to "consent to deferred prosecution," *id.* § 16-7-301(2)(d); *see also* WASH. REV. CODE §

9A.20.030(1) (directing prosecutors to investigate and recommend it to the court when "the alternative of restitution ... is appropriate and feasible.").

Such exercise of prosecutorial discretion *ex ante* complements the courts' authority to adjust sentences as appropriate and is an essential element of the dialogue between courts and prosecutors as to what constitutes appropriate punishment. The U.S. Sentencing Commission has recognized the sometimes imprecise alignment between the statutory definition of an offense and the actual conduct of an offender, and thus has provided mechanisms throughout the Sentencing Guidelines that allow sentencing courts to calibrate sentences to each individual. *See, e.g.*, U.S.S.G. § 4A1.3(b) (authorizing downward departures where "information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history"); *id.* § 5K2.0(a)(3) (departure from guideline range warranted if circumstances present are "substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense"). And now that the Federal Sentencing Guidelines are no longer mandatory, *United States v. Booker*, 543 U.S. 220, 245 (2005), federal courts have even greater discretion to individualize sentences such that they reflect, *inter alia*, "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1).

The exercise of a prosecutor's discretion, including to charge a lesser offense (or to decline to

charge at all), is particularly important in recidivism cases, as these laws tend to have graver sentencing implications than anyone—including legislatures—expects, should prosecutors attempt to enforce them in all cases covered by their terms. KADISH, *supra*, at 1006. The U.S. Attorney's Manual specifically provides that the decision to seek a recidivism enhancement pursuant to section 851 should be treated with the same diligence and attention to the particular facts of a case as the pursuit of any other charge under the U.S. Code. *See* U.S. Attorney's Manual § 9-27.300 cmt. ("Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 ... as equivalent to the filing of charges."). Thus, a prosecutor's decision not to seek a recidivist charge should be no more ignored by an immigration court than any other decision made by a prosecutor to charge one particular offense or another. And the implications for a recidivist determination can be stark—for example, depending on the circumstances, it can increase the statutory maximum sentence for simple possession from one year up to as many as five years, *see* 21 U.S.C. § 844.

As another example, the implications of California's recidivist sentencing scheme are so grave that the statute affirmatively provides prosecutors with broad discretion in determining which prior convictions will trigger increased sentences under the law. Under California's "three strikes" law, if a defendant has one prior "serious" or "violent" felony conviction, he must be sentenced to "twice the term otherwise provided as punishment for the current felony conviction," CAL. PENAL CODE § 667(e)(1), and two or more such priors require a

sentence of an indeterminate term of life imprisonment, with a minimum term of at least 25 years before eligibility for parole. *Id.* § 667(e)(2)(A). This third felony need not be "serious" or "violent"—"any felony can constitute the third strike." *Lockyer v. Andrade*, 538 U.S. 63, 67 (2003). However, the "three strikes" statutory scheme expressly provides for the exercise of prosecutorial discretion as a check against harsh results: "[t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice ... or if there is insufficient evidence to prove the prior conviction." CAL. PENAL CODE § 667(f)(1). Further, for certain offenses "known as 'wobblers,'" prosecutors may "exercise their discretion to charge a 'wobbler' as either a felony or a misdemeanor." *Ewing v. California*, 538 U.S. 11, 16-17 (2003).

In fact, the exercise of prosecutorial discretion has been the primary mitigation of the impact of this sentencing regime. According to the California District Attorneys Association, "[d]ata from California's most populous counties reveal that prosecutorial discretion to request the court to dismiss felony strikes is used in 21-40% of all Three Strikes cases." CAL. DISTRICT ATTORNEYS ASS'N, PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S THREE STRIKES LAW: A 10-YEAR RETROSPECTIVE 11 (2004), *available at* http://www.threestrikes.org/cdaa/Three Strikes_0.pdf; *see also id.* at i ("As District Attorney for San Mateo County since 1983, I ... signed the ballot argument in opposition to the Three Strikes initiative. In reality, the actual implementation of the law has been appropriate.... The fact that both the court and the prosecutor can cause priors to be

stricken establishes a balance in the law that was missing when Three Strikes was first enacted.").

Lawmakers rely upon such discretion by prosecutors when enacting harsh laws, guided by knowledge of the reality that, because most cases end in guilty pleas, prosecutors use such laws as bargaining tools and exercise their discretion not to charge such laws to the fullest extent possible. *See* William J. Stuntz, Bordenkircher v. Hayes: *Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351, 377-78 (Carol S. Steiker ed., 2006) (making this argument with respect to Congress and state legislatures).

Second, when a court interferes with prosecutors' discretion in the direction of mercy while deferring to their discretion in favor of harshness, as the Fifth Circuit's decision would allow, it creates uncertainty about the consequences of convictions and thus undermines prosecutors' ability to secure dispositions via plea agreement. This Court has observed that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Because the vast majority of cases are resolved by pleas—97% of convictions in the nation's 75 most populous counties[4]—this reduction in

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[4] Tracey Kyckelhahn & Thomas H. Cohen, *Felony Defendants in Large Urban Counties, 2004*, Bureau of Justice Statistics Bulletin (U.S. Dep't of Justice Office of Justice Programs, Wash. D.C.), Apr. 2008, at 3, *available at* http://ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf.

defendants' willingness to plea bargain will hinder prosecutors' ability to manage and efficiently dispose of their cases, further exacerbating the "[e]xtreme docket pressure [that] characterizes DAs' offices, particularly in the large cities where crime rates tend to be highest," Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601 (2005).

Uncertainty about the immigration consequences of convictions has had a significant impact upon the criminal justice system. It is already the case that "federal consequences of state crimes will vary according to state severity classifications when Congress describes an aggravated felony in generic terms, without express reference to the definition of a crime in a federal statute," *Lopez v. Gonzales*, 549 U.S. 47, 58 (2006), thus creating uncertainty as to how a conviction under a particular state's law will be treated for purposes of immigration law. The Fifth Circuit's decision further compounds this problem by creating uncertainty based solely upon the happenstance of where the government initiates removal proceedings. This affects prosecutors' ability to secure agreements by significantly increasing the possibility that even a plea to a minor offense will have immigration consequences. *See, e.g.*, Brittany Schoepp, *Panel Hears Deportation Fears of Hispanics*, WIS. STATE J., Feb. 26, 2008, at D1 (defense attorney stating that "many of his clients, who would normally accept plea bargains for minor crimes, are now too afraid that even a short jail sentence will mean deportation, so they take their case to trial").

Finally, other important law enforcement goals can be served when a prosecutor decides to exercise discretion to bring a lesser charge, such as in securing cooperation agreements. As the ABA has noted, "[p]rosecutors frequently and properly choose to pursue a lenient course with one participant in a criminal activity in order to bring other, more serious, offenders to justice." ABA STANDARDS § 3-3.9(b) cmt. In cases that rely heavily upon evidence provided by confidential informants, the ability to induce a plea to a lesser charge avoids a public trial in which the informant's identity would be revealed, thus reducing the "likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed," U.S. Attorney's Manual § 9-27.420 cmt. 7. And obtaining a plea in one case can free up prosecutorial resources that may be better used to dispose of other cases. *See id.* cmt. 11 ("A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined.").

In sum, the exercise of discretion in making charging decisions reflects an assessment of the facts, circumstances, and available resources by the prosecutor, the actor in the criminal justice system with the highest competence to exercise that discretion in a full and considered manner. Granting *certiorari* in this case provides the best vehicle for this Court to ensure that the crucial role that such discretion plays in the fair and efficient administration of criminal justice is respected by the lower courts.

B. The Fifth Circuit Failed to Account for the Important Role of Prosecutorial Discretion in the Statutory Scheme.

Given the necessary role that prosecutorial discretion plays in bringing a recidivist felony charge under 21 U.S.C. §§ 844 & 851, the failure of the Fifth Circuit to meaningfully acknowledge such a role in its analysis is a fatal flaw.

Congress specifically enacted 21 U.S.C. § 851 as part of the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 513, 84 Stat. 1236 (1970) in order to give prosecutors discretion not to seek recidivist treatment. "Whereas the prior version of the statute made enhancements for prior offenses mandatory, the new statutory scheme gave prosecutors discretion whether to seek enhancements based on prior convictions." *United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002); *see also* Report of House Committee on Interstate and Foreign Commerce, H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4566, 4576 ("[S]evere penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain.... [M]aking the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties....").

Nevertheless, in the decision below, the Fifth Circuit did not consider the import of the statutory scheme set forth in section 851, nor did it even mention the requirements a prosecutor must satisfy

to charge a recidivist felony under section 844. *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009). The Court of Appeals simply deemed "correct" the immigration judge's holding that "[b]ecause Carachuri's second state conviction could have been punished as a felony under the CSA, had he been prosecuted in federal court, he committed a 'drug trafficking crime,' making him ineligible for cancellation of removal." *Id.* at 264, 265. Missing from this analysis is the critical fact that such conviction could be punished as a felony *only if* a prosecutor chose to prosecute it as such pursuant to the requirements of section 851.

Similarly, while the Seventh Circuit noted that compliance with section 851's requirements was mandatory to charge a recidivist felony under section 844, *Fernandez v. Mukasey*, 544 F.3d 862, 866 (7th Cir. 2008), it nevertheless also ignored the import of that provision in its analysis. Absent from its discussion was the fact that petitioners would have been considered recidivists under federal law *only if* they had been charged as repeat offenders under 21 U.S.C. § 851. *Id.* at 877 (Rovner, J., dissenting); *see id.* ("And that is a big 'if.' After all, they were not charged as repeat offenders in state court. This is the 'one too many levels of hypothetical' with which we were concerned in [a previous case].").

It is telling that unlike these courts, the executive agency charged with the execution of this nation's immigration laws and the agency with the greatest expertise in the enforcement of such laws, gave due weight to the legislative scheme. In Petitioner's proceedings before the BIA, the

Department of Homeland Security ("DHS") changed its position with respect to this issue, "conced[ing] that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to 'recidivist possession' unless the State actually used those laws to prosecute [Petitioner]." *In re Carachuri-Rosendo*, 24 I. & N. Dec. at 390-91. The BIA observed that

> it seems that the DHS is troubled by the fact that a purely hypothetical approach, carried to its logical conclusion, could result in a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement.

Id. at 391. It further noted that "it would ... be anomalous to treat a second State conviction for simple possession as the hypothetical equivalent of a Federal 'recidivist possession' conviction when the State affirmatively elected not to proceed under its own available recidivism laws." *Id.*

The Second Circuit embraced the BIA's reasoning in its decision addressing the treatment of multiple state possession offenses, and specifically noted how the alternate approach advanced by the Fifth and Seventh Circuits would encroach upon the administration of the criminal justice system. Deeming state possession convictions federal felonies, "even when the State explicitly elected not to pursue a recidivist conviction," "would intrude on

prosecutorial discretion to make charging decisions, specifically undermining the State's ability to negotiate plea agreements with defendants who would admit guilty to drug possession with the understanding that their criminal records would reflect misdemeanor and not felony convictions." *Alsol v. Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008).

In light of the clear policy imperatives of both the Congress that enacted section 851 and the federal agency charged with executing its mandate, this Court should grant *certiorari* to resolve the circuit split in favor of the approach set forth by the BIA and the First, Second, Third and Sixth Circuits.

II. This Court Should Grant *Certiorari* Because the Fifth Circuit's Decision Fundamentally Undermines State Interests in the Proper and Equitable Administration of Criminal Justice and Results in Disparate Treatment of Criminal Defendants Facing Convictions in State Versus Federal Courts.

The decision of the Fifth Circuit interferes with the administration of state criminal justice systems and upsets the appropriate balance between state and federal interests in this nation's system of dual sovereigns. This Court has counseled federal courts to defer to appropriate exercises of state power as a matter of "proper respect for state functions, [as] a recognition of the fact that the entire country is made up of a Union of separate state governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Such deference is motivated by the "belief that the National Government will fare best if the

States and their institutions are left free to perform their separate functions in their separate ways." *Id.* The resulting balance between state and federal interests "is a system ... in which the National Government, anxious though it may be to vindicate ... federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* Such deference is particularly important with respect to states' exercise of their competence in the field of criminal justice, since "[s]tates possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

The Department of Justice has a strong policy of deferring to state determinations regarding the seriousness and method of prosecuting crimes. The Department "refus[es] to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement." *Rinaldi v. United States*, 434 U.S. 22, 28 (1977); *see also* U.S. Attorney's Manual § 9-2-031 ("preclud[ing] the initiation or continuation of a federal prosecution, following a prior state ... prosecution based on substantially the same act(s) or transaction(s)," unless various substantive and procedural prerequisites are met).[5] One of these requirements prohibits federal prosecution following a state trial unless there remain "substantial federal interest[s]" "demonstrably unvindicated" by the state

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[5] This federal policy is called the "Petite policy," based on *Petite v. United States*, 361 U.S. 529 (1960).

proceedings. *See* U.S. Attorney's Manual § 9-2-031. That requirement cannot be met here.

Rather, Petitioner's circumstance presents a stark example of the severe consequences of inadequate respect for and deference to state determinations. Carachuri-Rosendo was a lawful permanent resident who has since been removed from the country and separated from his fiancée and four children, all of whom are U.S. citizens, based on a misdemeanor conviction for possession of a single tablet of Xanax, an anti-anxiety drug, without a prescription. This simple possession conviction was deemed a recidivist felony by the immigration court because of a prior misdemeanor conviction for possession of zero to two ounces of marijuana, despite the state prosecutor's decision not to charge Petitioner as a recidivist.

When a federal court countermands a state prosecutor's considered decision in this fashion, it causes disparate treatment among state and federal defendants based solely on which government brought the prosecution. Had a federal prosecutor made the same charging decision with respect to Petitioner's second offense, her decision and Petitioner's immigration status would have remained undisturbed. Without addressing the point, the Fifth Circuit nonetheless held that despite the considered decision of the state prosecutor not to pursue a felony charge, a federal immigration court may second-guess that exercise of discretion and penalize Petitioner as if he had been charged and convicted as a recidivist.

Indeed, given that nearly all criminal prosecutions proceed in state rather than federal court, the Court of Appeals' approach risks a pervasive problem. As noted above, the U.S. Attorney's Manual contemplates treating the decision to file an information under section 851 for a recidivist enhancement as equivalent to the decision to file a charge and notes that there are legitimate policy reasons why a prosecutor might decline to charge a defendant as a recidivist. U.S. Attorney's Manual § 9-27.300 cmt. "Such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office." *Id.*

In practice, federal prosecutors readily exercise their discretion to decline a recidivist charge. According to figures compiled by the Bureau of Justice Statistics, 1,376 defendants were charged under 21 U.S.C. § 844 in 2007. In that same year, only 3 defendants were convicted of a recidivist drug felony pursuant to 21 U.S.C. § 851. *See* Bureau of Justice Statistics, Federal Justice Statistics Resource Center, http://fjsrc.urban.org/. By contrast, based on the most recent data available, almost 160,000 defendants were convicted of drug possession felonies in state courts in 2004. *See Drugs and Crime Facts: Drug Law Violations—Pretrial, Prosecution, and Adjudication*, http://www.ojp.usdoj.gov/bjs/dcf/ptrpa.htm#prosecut.[6] Thus,

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[6] Only data on felony (not misdemeanor) offenses are available on the Bureau of Justice Statistics website.

while a miniscule portion of federal defendants in drug cases have actually been convicted of recidivist felonies, many thousands of state defendants convicted of drug possession misdemeanors could be treated as recidivist felons under federal law under the Fifth Circuit's approach. If federal prosecutors properly consider whether they are overburdened or whether resources merit prosecution in deciding whether to charge a defendant as a recidivist, certainly state prosecutors—with their far more crushing caseloads—are entitled to take those same factors into account and receive the same deference as to their judgment.

III. This Court Should Grant *Certiorari* Because the Scheme Set Forth By the Fifth Circuit Can Lead to a Violation of a Defendant's Right to Trial by Jury Under the Sixth Amendment.

Should the Fifth Circuit's decision stand, defendants convicted of a misdemeanor offense to which a jury trial right does not attach could nevertheless have that conviction treated as an aggravated felony—an offense to which the right *does* attach. To treat a defendant as a convicted felon while depriving her of a trial by jury for that offense violates her rights under the Sixth Amendment.

Under the Sixth Amendment, "a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 542 (1989); *see also* U.S. CONST. amend. VI. There is, however,

"a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). While this Court has declined to categorically classify offenses carrying a maximum term of six months or less as "petty" offenses, it has held that it is "appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'" *Blanton*, 489 U.S. at 543-44. In light of this presumption, "[a] defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* at 544.

Some jurisdictions have limited the jury trial right to extend only to charges for offenses with an authorized term of greater than six months. *See, e.g.*, N.Y. CRIM. PROC. LAW § 340.40(2). Other jurisdictions have authorized maximum penalties for several drug possession offenses of less than six months. *See, e.g.*, COLO. REV. STAT. § 18-18-406(3) (possession and open display or consumption of not more than one ounce of marijuana is punishable at maximum by a fine and 15 days in county jail). Thus, in jurisdictions with limitations upon the jury trial right, there are drug possession offenses to which that right does not attach, but which, for a defendant convicted multiple times, could under the Court of Appeals' approach be treated as aggravated felonies. For example, under New York law, criminal possession of marijuana in the fifth degree is a Class B misdemeanor, N.Y. PENAL LAW § 221.10,

punishable by a term of imprisonment that "shall not exceed three months," N.Y. PENAL LAW § 70.15(2). A defendant in New York City charged with a misdemeanor with an authorized term of less than six months is eligible only for a bench trial, *see* N.Y. CRIM. PROC. LAW § 340.40(2). Thus, a defendant twice-convicted in New York City of possession of marijuana in violation of § 221.10 facing removal proceedings in the Fifth Circuit could be treated as a felon, despite being unable to secure a trial by jury for the second offense in violation of her Sixth Amendment right to trial by jury.

This Court should grant *certiorari* in this case to ensure that such violations under the scheme set forth by the Fifth Circuit decision—which would depend in large part upon the arbitrary factor of where removal proceeds are initiated—do not occur.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 09-60

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, THE IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER, THE NATIONAL IMMIGRANT JUSTICE CENTER, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case: Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

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INTERESTS OF *AMICI CURIAE*[1]

Amici are organizations of defense attorneys or organizations that advise defense attorneys whose clients could face removal and other severe immigration consequences following a guilty plea or conviction at trial. This case presents a mature and entrenched split among the courts of appeals concerning a critically important issue that has significantly hampered *amici*'s ability to effectively advise noncitizens and impacts the lives and families of immigrants throughout the United States: whether two disparate, unconnected, low-level possession adjudications can be combined to be deemed a conviction of "illicit trafficking in a controlled substance," and therefore an "aggravated felony," for purposes of federal immigration law. The "aggravated felony" label carries drastic consequences, triggering bars to asylum, citizenship, and relief from removal. The circuit split makes it essentially impossible for *amici* to effectively advise immigrants and their defense counsel about the immigration consequences of second or subsequent drug possession charges during either criminal proceedings or subsequent immigration proceedings.[2] *Amici* are also unable to properly train counsel and judges about the immigration consequences of low-level drug possession adjudications.

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[1] Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Immigration judges are bound to apply the rule of the circuit in which they sit. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394–96 (BIA 2002).

As organizations concerned with the proper and consistent interpretation of the intersection of immigration and criminal law, *amici* respectfully urge the Court to resolve the important issues raised in this case.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **National Legal Aid and Defender Association** (NLADA), a non-profit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including non-

profit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members. NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community. NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed amicus curiae briefs in major constitutional cases before the United States Supreme Court and other federal and state courts involving the administration of the criminal justice system and the right to counsel.

The **National Association of Federal Defenders** (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, nonprofit, volunteer organization whose membership is composed of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

The **Immigrant Defense Project** (IDP) provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on amicus curiae briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including this Court's recent decision in *Lopez v. Gonzalez*, 549 U.S. 47, 127 S. Ct. 625 (2006). See Brief for *Amici Curiae* New

York State Defenders Association Immigrant Defense Project, et al., *Lopez v. Gonzales*, 549 U.S. 47 (2006) (No. 05-547), available at http://www.immigrantdefenseproject.org/webPages/drugLitigationInit.htm; see also Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583); Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

Heartland Alliance's **National Immigrant Justice Center** (NIJC) is a Chicago-based organization working to ensure that the laws and policies affecting non-citizens in the United States are applied in a fair and humane manner. NIJC provides free and low-cost legal services to approximately 8,000 non-citizens per year, and represents hundreds of non-citizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences. For nearly ten years, NIJC has offered no-cost trainings and consultation to criminal defense attorneys representing non-citizens, to advise them

on the likely immigration consequences resulting for their clients from various potential dispositions in the criminal case; NIJC also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings. Because of the severity of the immigration consequences for non-citizens, NIJC has a strong interest in ensuring that criminal convictions have consequences which are reasonable, predictable, and publicly known.

The **National Immigration Project of the National Lawyers Guild** (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of Immigration Law and Crimes and three other treatises published by Thomson-West. The National Immigration Project has participated as amicus curiae in several significant immigration-related cases before this Court.

SUMMARY OF ARGUMENT

The circuit courts now apply the aggravated felony label to simple drug possession offenses in dramatically different ways. The Fifth Circuit below has joined the Seventh Circuit in rejecting the considered position of the government's own Board of Immigration Appeals (BIA) and reaffirmed its commitment to one of the most sweeping and aggressive interpretations of the term "aggravated felony"—explicitly rejecting the holdings of four other circuit courts (the First, Second, Third, and Sixth Circuits)—when it opted to treat petitioner's misdemeanor conviction

for possession of one tablet of Xanax, with its ten day jail sentence, as a crime within the meaning of 8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance"), and therefore an "aggravated felony."[3]

The discord among the circuit courts impacts large numbers of immigrants nationwide. The Department of Homeland Security (DHS) often detains a non-citizen with a low-level drug possession conviction in a jurisdiction outside the circuit in which the adjudication occurred, and often transfers the non-citizen several times from one detention facility to another. Non-citizens with New York adjudications, for example, are regularly transferred to detention facilities in various circuits outside the Second Circuit including facilities in Pennsylvania (Third Circuit), Louisiana and Texas (Fifth Circuit) and New Mexico (Tenth Circuit). Because immigration judges apply the law of the circuit in which they sit, the combination of the circuit split and these routine transfers have rendered non-citizens and their counsel entirely unable to determine what law will apply to determine the immigration effect of low-level drug possession convictions.

Virtually all non-citizens, including lawful permanent residents, are deportable if they have been convicted of a drug-related offense. When that drug offense is labeled an "aggravated felony," however, immigration judges are barred from granting cancellation of removal for certain lawful permanent resi-

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[3] *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009). *Accord Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009).

dents, asylum, or several basic forms of relief from removal, no matter how harmful removal may be for the non-citizen or her family. There is no exception for lawful permanent residents who have spent most of their lives in the United States, asylum seekers who have experienced persecution in their home countries, members of the U.S. Armed Forces, or immigrants with U.S. families.

The Fifth Circuit's interpretation of the "illicit trafficking" definition sweeps low-level and non-criminal simple possession offenses within its ambit, amounting to a bait-and-switch for non-citizens facing such charges. In some states, limited procedural safeguards exist for these low-level adjudications, which may result in no more than a small fine and may leave a defendant with no "criminal record" as defined under state law. In New York State, for example, many such possession offenses are defined as non-criminal violations. The relatively perfunctory processing of low-level drug charges is rooted in the understanding that these defendants face less serious direct and collateral consequences. Essentially duped into believing that these charges were resolved with a quick plea, many non-citizens now find themselves subject to U.S. immigration law's most severe penalties, despite the fact that they were charged with the most minor drug possession offenses that exist within state penal codes.

Given the severity of the penalties that follow the application of the aggravated felony label, the uncertainty created by the circuit courts' divergent applications of the "aggravated felony" term should now be speedily resolved. The circuit split undermines the rule of law by making it impossible for counsel to advise their clients accurately about the potential consequences of a disposition because that disposition

can lead to vastly different consequences depending on where DHS elects to commence removal proceedings in immigration court.

Amici request that the Supreme Court grant certiorari to resolve this important issue, which impacts the lives and families of many legal permanent residents. The circuit split will continue to affect a growing number of non-citizens until the Supreme Court intervenes. Indeed, other similarly affected petitioners have already sought certiorari on this issue since the filing of the certiorari petition in this case. *See Escobar v. Holder*, No. __-___ (filed Aug. 17, 2009), *Fernandez v. Holder*, No. 09-5386; *Erazo-Villatoro v. United States*, No. 09-5589.

ARGUMENT

I. CERTIORARI IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT DUE TO THE LARGE NUMBER OF LEGAL PERMANENT RESIDENTS WHO ARE CONVICTED OF LOW-LEVEL POSSESSION OFFENSES, OFTEN WITH MINIMAL PROCEDURAL PROTECTIONS.

The split among the circuit courts of appeals concerns how to determine whether a state-law drug possession offense fits the aggravated felony definition of "illicit trafficking in a controlled substance."[4] The circuits are divided over whether, under 8 U.S.C. §§ 1229b(a)(3) and 1101(a)(43)(B), immigration courts can transform two disparate, low-level controlled substance possession offenses into a "drug

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[4] For a complete summary of the circuit split, see Petition of Petitioner-Appellant for a Writ of Certiorari, *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 2009 WL 1492821 (5th Cir. 2009), *petition for cert. filed*, No. 09-50 (June 15, 2009).

trafficking" aggravated felony, dictating essentially mandatory removal from the United States.

Large numbers of legal permanent residents across the country are affected by the circuit split. The Fifth Circuit's decision in *Carachuri-Rosendo v. Holder* holds that a second or subsequent low-level state drug possession offense can qualify as an aggravated felony in immigration proceedings, because the immigration judge can refer back to prior conduct not covered by the actual statute of conviction.[5] This rule visits extremely harsh consequences on lawful permanent residents who may have quickly pled guilty to a low-level drug possession offense and received a small fine or several days in jail.

DHS apprehends and detains a large and growing number of non-citizens on the basis of low-level drug possession offenses. Over the past fifteen years, the size of the daily population in DHS detention facilities more than quadrupled, from 6,785 in 1994 to 31,244 in 2008.[6] In 2008, DHS detained approximately 379,000 non-citizens, removing approximately 97,100 due to alleged criminal convictions.[7] Drug related offenses accounted for 35.9% of these removals.[8]

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[5] 570 F.3d 263 (5th Cir. 2009).

[6] ALISON SISKIN, CONGRESSIONAL RESEARCH SERV., IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2008), available at http://bibdaily.com/pdfs/CRS%20detention%201-30-08.pdf.

[7] DEPARTMENT OF HOMELAND SECURITY ANNUAL REPORT, IMMIGRANT ENFORCEMENT ACTIONS (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

[8] *Id.*

Across the country, low-level drug possession offenses are processed in great numbers and with great speed, placing severe demands on a strained indigent defense system. The New York criminal justice system illustrates this principle. The New York example is particularly relevant because non-citizens with New York convictions are regularly detained and placed in removal proceedings in other jurisdictions, including the Fifth Circuit. These New Yorkers face dramatic immigration consequences despite New York State's minimal procedural protections for low-level drug offenders.

Between 1995 and 2004, there were 258,655 convictions for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor under New York law. Of this number, almost sixty percent resulted in sentences of time served, probation only, conditional discharge, or fines. Of the remainder, the median length of sentence imposed was between nineteen and twenty days.[9] In 2008, of the total 226,267 convictions following all misdemeanor arrests in New York State, less than twenty percent received jail or prison sentences.[10]

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[9] N.Y. STATE DEFENDERS ASS'N, ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), available at http://www.immigrantdefenseproject.org/docs/05_Analysis.pdf. A person is guilty of Criminal Possession of a Controlled Substance in the Seventh Degree when he knowingly and unlawfully possesses a controlled substance. N.Y. PENAL LAW § 220.03.

[10] N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT DISPOSITIONS OF ADULT ARRESTS 2004-2008: N.Y. STATE BY COUNTY AND REGION, available at http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/index.htm.

Not surprisingly, most low-level drug offenses are processed quickly and without substantial procedural protections because of the understanding that serious direct and collateral consequences will not follow from a conviction. Defendants facing such charges often plead guilty at arraignment, and are arraigned, plead, and sentenced on the same day.[11] Because judges in New York Criminal Court handle approximately eighty criminal cases a day, judges can often spend only minutes per case.[12] Likewise, neither the defense nor the prosecution has the time to investigate the merits of each case. In New York City, indigent defendants may speak to a defense attorney for the first time only minutes before arraignment. Outside of New York City, the cases may be heard before Town or Village justices or police court judges, many of whom are not lawyers and have only minimal training.[13]

New York is not alone in processing huge numbers of low-level misdemeanor cases with minimal procedural protections. An April 2009 report of amicus National Association of Criminal Defense

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[11] *See* N.Y. STATE BAR ASS'N, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17–18 (2001).

[12] JUANITA BING NEWTON, WILLIAM H. ETHERIDGE III, CRIMINAL COURT OF THE CITY OF NEW YORK, ANNUAL REPORT 2007, available at http://www.nycourts.gov/courts/nyc/criminal/NYCCC%20Annual%20Report%20Final%20072508.pdf. Criminal possession in the 7th degree is the second most arraigned charge in 2007 in New York City. *Id.*

[13] TESTIMONY OF COREY STOUGHTON, STAFF ATTORNEY AT THE NEW YORK CIVIL LIBERTIES UNION BEFORE JUDICIARY COMMITTEE OF THE NEW YORK STATE ASSEMBLY REGARDING PROPOSALS TO REFORM THE NEW YORK STATE JUSTICE COURTS (Dec. 14, 2006), available at http://www.nyclu.org/node/748.

Lawyers found that "[t]he vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas," with three-quarters of Texas counties appointing counsel in fewer than twenty percent of jailable misdemeanor cases.[14] In one Texas county, amicus NACDL's researchers observed court staff routinely directing uncounseled misdemeanor defendants to confer directly with the prosecutor regarding a possible plea; in some cases defendants pleaded to jail sentences without being informed of their right to counsel.[15]

Even when misdemeanor defendants are represented by counsel, crowded dockets and limited defender resources place enormous pressures on many criminal defendants to quickly enter guilty pleas to minor charges after only minimal consultation with counsel. The Knox County Public Defender in Tennessee reported that in 2006, six misdemeanor attorneys handled over 10,000 cases, averaging slightly under one hour per case.[16] Similarly, the Atlanta City Public Defender Office averaged 2,400 cases per attorney in 2008, calculating that each case received on average fifty-nine minutes of counsel's time; in 2009 that figure is projected to fall to forty-two min-

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[14] ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 15 (2009) (internal quotation marks and citation omitted), available at http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf.

[15] *Id.* at 15-16.

[16] NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 68 (2009), available at http://tcpjusticedenied.org/.

utes.[17] Under these pressures, amicus NACDL has concluded, "[i]ndigent defenders . . . almost always prioritize felony cases, to the detriment of persons accused of misdemeanors."[18] As a result, misdemeanor prosecutions, including low-level drug possession offenses, are especially likely to be disposed by "meet-and-plead" guilty pleas at an initial court appearance.[19]

The current confusion among the circuits as to the appropriate application of the aggravated felony label will subject non-citizens with low-level state drug possession dispositions to consequences far more serious than are merited by the perfunctory treatment their cases receive.

II. CERTIORARI IS WARRANTED BECAUSE THE SEVERE CONSEQUENCES OF THE AGGRAVATED FELONY LABEL ARE DISPROPORTIONATE TO THE LOW-LEVEL AND SUMMARY NATURE OF THE SIMPLE POSSESSION DISPOSITIONS AT ISSUE.

The exceptionally harsh direct and collateral consequences that flow from the drug trafficking aggravated felony determination are wholly disproportionate to the low-level and summary nature of most simple drug possession adjudication proceedings.

Virtually every non-citizen convicted of a drug offense is deportable.[20] Congress has chosen to lessen

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[17] Boruchowitz, *supra* note 14, at 26.

[18] *Id.*

[19] *Id.* at 31.

[20] 8 U.S.C. § 1227(a)(2)(B) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country

the exceptionally broad impact of this law by allowing immigration judges to find that certain deportable non-citizens are eligible for cancellation of removal or asylum upon a showing of sufficient positive equities or a threat of persecution in their country of origin, respectively.[21] The aggravated felony determination acts as a per se bar to these forms of relief,[22] preventing immigration judges from granting relief even for those non-citizens who served in the Armed Forces, who have U.S. citizen family members, or who would face extreme hardship or personal danger in their country of origin. Most persons whose convictions are deemed "aggravated felonies" are also barred from obtaining U.S. citizenship.[23] For non-citizens other than lawful permanent residents, an aggravated felony conviction triggers administrative removal without the right to a hearing in immigration court before a neutral judge;[24] for all respondents in removal proceedings who have been released from custody for an aggravated felony conviction after October 9 of 1998, the law requires mandatory detention while in proceedings, regardless of the actual degree of flight risk or danger to the community posed by the individual.[25]

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relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

[21] 8 U.S.C. §§ 1158(b)(1)(A), 1229b(a).

[22] 8 U.S.C. §§ 1158(b)(2)(B)(i), 1229b(a)(3).

[23] 8 U.S.C. §§ 1101(f)(8), 1427(a)(3); Immigration Act of 1990 § 509(b), Pub. L. No. 101-649, 104 Stat. 4978, 5051 (Nov. 29, 1990).

[24] 8 U.S.C. § 1228(b).

[25] 8 U.S.C. § 1226(c)(1)(B); *In re Adenji*, 22 I. & N. Dec. 1102, 1107-11 (BIA 1999).

The case of Jerry Lemaine, whose final order of removal is currently before the Fifth Circuit, exemplifies the harsh consequences of the Fifth Circuit's approach. In 2000, Mr. Lemaine received an adjournment in contemplation of dismissal (known as an "ACD") under N.Y. Crim. Proc. Law § 170.56 following a charge of non-criminal possession of marijuana. The government has argued that, even though the charges were ultimately dismissed, the issuance of an ACD qualifies as a "conviction" under federal law. In 2007, Mr. Lemaine pled guilty to non-criminal possession of marijuana under N.Y. Penal Law § 221.05. The maximum penalty for this violation was $100. Nevertheless, he was subsequently arrested by DHS, denied bail, and has been shuffled from one detention facility to another, thousands of miles from New York, awaiting deportation to Haiti, a country he has not seen since age three.

At the time of his second conviction, Mr. Lemaine was attending the Hunter Business School Nursing Program and caring for his U.S. citizen sister, who suffers from hydrocephaly. Mr. Lemaine could not have anticipated that, as a result of a quick plea to a non-criminal violation, the severe consequences of the aggravated felony label would prevent him from presenting any of these positive equities to an immigration judge and would mandate a lengthy detention.

III. CERTIORARI IS WARRANTED BECAUSE THE GOVERNMENT MAY COMMENCE REMOVAL PROCEEDINGS AGAINST ANY NON-CITIZEN IN ANY CIRCUIT, LEADING TO THE ARBITRARY APPLICATION OF THE AGGRAVATED FELONY LABEL.

The circuit split does far more than simply subject individuals with similar dispositions to different law in different parts of the country. DHS's practice is to detain non-citizens, and to commence removal proceedings against them, in the location and circuit of DHS's choosing—regardless of the non-citizen's residence or the location of her alleged offense. The BIA has held that, in determining whether a drug conviction constitutes an aggravated felony, immigration judges must defer to the interpretation given to the phrase "illicit trafficking in a controlled substance" by the circuit in which they sit.[26] Because DHS detainees may be held anywhere in the country and are frequently transferred multiple times before proceedings are commenced by filing of the Notice to Appear with the immigration court, *amici* are unable to provide effective advice and guidance concerning the eligibility for relief of noncitizens convicted of second and subsequent possessory offenses.

Recognizing the grave problems created by this disuniformity, the BIA sought to provide "guidance" to the circuit courts that had not yet ruled on the issue by choosing the *Carachuri* "appeal as the vehicle for articulating our analytical approach."[27] The BIA flatly rejected the Fifth Circuit's approach as "an ex-

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[26] *Yanez-Garcia*, 23 I. & N. Dec. at 396.

[27] *In re Jose Angel Carachuri-Rosendo*, 24 I. & N. Dec., 382, 391 (BIA 2007).

pansive, and apparently noncategorical, inquiry," that "would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that could have been prosecuted as a Federal felony."[28] Yet roughly twenty-nine percent of all non-citizens detained are held in the Fifth Circuit, subject to its harsh minority rule regarding second and subsequent possession offenses.[29] Many of these detainees resided and were prosecuted, convicted, and taken into DHS custody in circuits that apply a different rule.

Mr. Lemaine's case again provides a vivid illustration of the effects of DHS's common practice of transferring detainees between circuits. Mr. Lemaine resided in New York from his original immigration in 1985. He was initially detained in New York, then transferred to a Monmouth County facility in New Jersey, and then to a facility in Los Fresnos, Texas, where he was finally issued a Notice to Appear before an immigration judge. Mr. Lemaine applied for, inter alia, cancellation of removal. However, under the Fifth Circuit rule, the immigration judge concluded that he was an aggravated felon, thereby pretermitting his claim for cancellation of removal and concluding that detention was mandatory.

Had DHS filed Mr. Lemaine's Notice to Appear with the immigration court in New York, where he resided and where his alleged offenses occurred, he

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[28] *Id.* at 393.

[29] U.S. DEP'T OF HOMELAND SECURITY, RESPONSE TO FOIA CASE NO. 09-FOIA-1243 (Feb. 6, 2009) (on file with counsel).

would have been able to present his claims for relief from removal. The Second Circuit made this clear in its decision in *Alsol v. Mukasey*, where it held "that a second simple drug possession conviction is not an aggravated felony for immigration purposes,"[30] reasoning: "[I]f one who was not convicted as a recidivist nonetheless faced removal as a recidivist, the [immigration judge] would have to determine, for the first time, that an alien was a recidivist. This is inappropriate not only because of the [immigration judge]'s lack of expertise in the criminal law but also because the alien cannot challenge the validity of his prior conviction in the removal proceedings."[31] However, simply because DHS elected to transfer Mr. Lemaine to the Fifth Circuit, he was subjected to mandatory detention and his claims for relief from removal were barred.

IV. CERTIORARI IS WARRANTED BECAUSE THE DISUNIFORMITY, PARTICULARLY COUPLED WITH DHS'S POLICY OF TRANSFERRING DETAINEES, MAKES IT IMPOSSIBLE FOR CRIMINAL COUNSEL TO EFFECTIVELY ADVISE CLIENTS.

The circuit split, coupled with DHS detention and transfer policies, presents an extreme difficulty to criminal defense attorneys attempting to counsel their clients as to the consequences that might flow from a guilty plea. As a result of the circuit split, a non-citizen with a low-level drug possession offense may be subject to drastically different consequences

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[30] *Alsol v. Mukasey*, 548 F.3d 207, 219 (2d Cir. 2008).

[31] *Id.* at 217.

depending upon where she is detained and placed in proceedings.

Amici are organizations composed of defense attorneys or that advise defense attorneys whose clients could face removal and other severe immigration consequences following a guilty plea or conviction at trial. Part of *amici*'s mission is to train attorneys to give sound legal advice to their clients, including non-citizen clients. To properly counsel immigrant clients about the consequences of taking a plea, criminal defense attorneys and the immigration law experts who train and advise them need the guidance of the Court in order to be able to predict reliably and accurately the impact of a drug possession disposition on the non-citizen's immigration status. The split among the circuits makes it all but impossible for *amici* to provide reliable advice when there is no guarantee that non-citizens will face removal proceedings in the same jurisdiction where they reside or their criminal charges are adjudicated.

The defense attorneys, prosecutors, and judges dealing with indigent defendants all carry massive caseloads. The over-burdened criminal court system usually depends on most cases, especially the sort of minor drug possession offenses at issue in this case, being disposed of quickly through plea bargains. Advocates frequently have only minutes to talk to their clients before a hearing. Thus, it is essential for attorneys to have clear rules to guide the immigration advice they provide, especially when the potential immigration consequences are likely to dwarf the criminal sanctions imposed for a low-level offense.

In short, a stable and uniform definition of the term "aggravated felony" is necessary for defense at-

torneys and immigrant advocates to advise non-citizens who are making life-altering decisions.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for the writ of certiorari should be granted.

Respectfully submitted.

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August 17, 2009

JOINT APPENDIX

(8)

Supreme Court, U.S.
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JAN 28 2010
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No. 09-60

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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APPENDIX A

CHRONOLOGICAL LISTING OF COURT OF APPEALS DOCKET ENTRIES

General Docket
United States Court of Appeals
for the 5th Circuit

Court of Appeals Docket #: 07-61006
Carachuri-Rosendo v. Holder
Appeal From: Board of Immigration Appeals

Docketed: 12/24/2007

Termed: 05/29/2009

Case Type Information:
1) Immigration
2) Petition for Review
3)

Originating Court Information:
District: BIA8-1 : (Alien Registration Number)
Date Filed:
Date Decided: 12/13/2007

Prior Cases: None

Current Cases:

	Lead	Member	Start	End
AIMS Addi-tional				
	08-60150	08-60190	02/29/2008	
	08-60843	08-61081	12/01/2008	
Related				
	07-40955	08-60278	05/02/2008	
	07-50731	08-60278	05/02/2008	
	07-61006	08-60063	08/26/2008	
	07-61006	08-60108	08/26/2008	
	07-61006	08-60150	08/26/2008	
	07-61006	08-60168	07/16/2008	
	07-61006	08-60190	08/26/2008	
	07-61006	08-60278	05/02/2008	
	07-61006	08-60282	08/26/2008	
	07-61006	08-60343	05/14/2008	
	07-61006	08-60818	10/20/2008	
	07-61006	08-60843	09/16/2008	
	08-60234	07-40955	06/19/2008	
	08-60234	07-50731	06/19/2008	
	08-60234	07-61006	06/19/2008	
	08-60234	08-60818	10/20/2008	
	08-60286	07-61006	05/29/2008	
	08-60636	07-61006	09/09/2008	
	08-60636	08-60168	09/09/2008	
	08-60636	08-60278	09/09/2008	
	08-60745	07-61006	08/14/2008	
	08-61132	07-61006	02/03/2009	
	09-60115	07-61006	03/06/2009	
	09-60181	07-61006	03/18/2009	
	09-60181	08-60168	03/18/2009	
	09-60181	08-60278	03/18/2009	
	09-60181	08-60477	03/18/2009	
	09-60181	08-60636	03/18/2009	
	09-60323	07-61006	04/30/2009	

09-60323	08-60168	04/30/2009
09-60323	08-60278	04/30/2009
09-60323	08-60636	04/30/2009

Panel Assignment:

Panel: EHJ	CDK	JWE
Date of Hearing:	**Date of Decision:**	
04/27/2009	05/29/2009	

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NEW YORK STATE DEFENDERS ASSOCIATION Amicus Curiae	James Walden Direct: 212-351-2300 Email: jwalden@gibsondunn.com Fax: 212-351-5300 [COR LD NTC Retained] Gibson, Dunn & Crutcher, L.L.P. 47th Floor 200 Park Avenue

New York, NY 10166-0193

JOSE ANGEL CARACHURI-ROSENDO

Petitioner

v.

ERIC H HOLDER, JR, U S ATTORNEY GENERAL

Respondent

Date	Docket Text
12/24/2007	Agency case docketed. Petition for review filed by Petitioner Jose Angel Carachuri-Rosendo. [07-61006] ROA due on 2/4/08. (NFD)
12/24/2007	Motion filed by Petitioner Jose Angel Carachuri-Rosendo to proceed in forma pauperis [5924814-1] Date of COS: 12/21/07 Sufficient [Y/N]: Y [07-61006] (NFD)
01/31/2008	Appearance forms filed by John Clifford Cunningham and Saul Greenstein for Respondent Michael B Mukasey. [07-61006] (No. of forms filed: 2) (DLJ)
02/04/2008	Motion filed by Respondent Michael B Mukasey to extend time to file administrative record until 3/5/08 [5953303-1] Sufficient [Y/N]: y [07-61006] (MBC)

Date	Docket Text
02/04/2008	CLERK Order filed granting motion to extend time to file administrative Record [5953303-1] ROA ddl updated to 3/5/08. Copies to all counsel. [07-61006] (MBC)
02/15/2008	Administrative Record filed. Electronic pleadings: Y [07-61006] ROA ddl satisfied. (MBC)
04/01/2008	COURT Order filed - The petitioner has submitted a financial statement and an affidavit statin that because of his porverty he is unable to pay the fees and costs for this application. Because of his inability to pay the required fees and costs, his motion to proceed in forma pauperis is GRANTED. (IN DETAIL) [5924814-1] (EBC) Copies to all counsel. [07-61006] (NFD)
04/01/2008	Briefing notice issued. [07-61006] A/Pet's Brief due on 5/12/08 for Jose Angel Carachuri-Rosendo. (NFD)
05/09/2008	Unopposed motion filed by Petitioner Jose Angel Carachuri-Rosendo to substitute counsel Lawrence Rushton for Joseph A Vail [6023857-1]. Date of COS: 5/8/08 Sufficient [Y/N]: y [07-61006] (AGL)
05/09/2008	Unopposed motion filed by Petitioner Jose Angel Carachuri-Rosendo to extend time to file petitionr's brief until 6/12/08 [6023861-1]. Date of COS: 5/8/08 Sufficient [Y/N]: y [07-61006] (AGL)

Date	Docket Text
05/09/2008	CLERK Order filed granting petitioner's unopposed motion to substitute counsel (attorney Joseph Anthony Vail for Jose Angel Carachuri-Rosendo terminated) Aty Added: Lawrence Rushton [6023857-1]; granting in part petitioner's unopposed motion to extend time to file petitioner's brief [6023861-1] A/Pet's Brief ddl to 6/11/08 for Jose Angel Carachuri-Rosendo. Copies to all counsel. [07-61006] (MLF)
05/09/2008	Appearance form filed by Lawrence Erik Rushton for Petitioner Jose Angel Carachuri-Rosendo. [07-61006] (No. of forms filed: 1) (KKF)
06/11/2008	Appellant's Brief filed by Petitioner Jose Angel Carachuri-Rosendo. Disk Provided [Y/N]: Y Sufficient [Y/N]: Y [6048203-1] [07-61006] A/Pet's Brief ddl satisfied. E/Res's Brief due on 7/11/08 for Michael B Mukasey. (PAC)
06/26/2008	Motion filed by Amicus Curiae New York St Assn to file amicus brief [6063335-1], for leave to file brief out of time [6063335-2] Brief tendered? (Y/N): y Date of COS: 6/25/08 Sufficient [Y/N]: y [07-61006] (MBC)
07/01/2008	Unopposed motion filed by Respondent Michael B Mukasey to extend time to file brief until 8/11/08 [6063340-1] Date of COS:

Date	Docket Text
	6/30/08 Sufficient [Y/N]: y [07-61006] (MBC)
07/01/2008	CLERK Order filed granting New York State Defenders Association's motion to file amicus brief [6063335-1], granting New York State Defenders Association's motion to file amicus brief out of time [6063335-2] Copies to all counsel. [07-61006] (DDV)
07/01/2008	Amicus curiae brief filed by Amicus Curiae New York St Assn Consent included in brief? [Y/NA] NA Disk Provided [Y/N]: n Sufficient [Y/N]: n ATY WALDEN NEEDS APPRNC FORM [6066622-1] [07-61006] Sufficient Brief due on 7/18/08 for New York St Assn. (DDV)
07/02/2008	CLERK Order filed granting respondent's unopposed motion to extend time to file Appellee's Brief [6063340-1] E/Res's Brief ddl updated to 8/11/08 for Michael B Mukasey. Copies to all counsel. [07-61006] (DDV)
07/16/2008	Appearance form filed by James Walden for Amicus Curiae New York St Assn. [07-61006] (No. of forms filed: 1) Sufficient Brief ddl satisfied. (MLF)
07/16/2008	Appearance form filed by Ada Elsie Bosque for Respondent Michael B Mukasey. [07-61006] (No. of forms filed: 1) (MLF)
08/14/2008	Appellee's Brief filed by Respondent

Date	Docket Text
	Michael B Mukasey. Disk Provided [Y/N]: Y Sufficient [Y/N]: Y [6095397-1] [07-61006] E/Res's Brief ddl satisfied. Reply Brief due on 8/28/08 for Jose Angel Carachuri-Rosendo. (MLF)
08/26/2008	Reply brief filed by Petitioner Jose Angel Carachuri-Rosendo. Disk Provided [Y/N]: Y Sufficient [Y/N]: N NEED APPEARANCE FORM FOR THOMAS PERKINSON [6104976-1] [07-61006] Sufficient Brief due on 9/5/08 for Jose Angel Carachuri-Rosendo. Reply Brief ddl satisfied. , (MLF)
08/26/2008	Appearance form filed by Thomas F Perkinson for Petitioner Jose Angel Carachuri-Rosendo [07-61006] (No. of forms filed: 1) Sufficient Brief ddl satisfied. (MLF)
09/22/2008	Supplemental authorities (FRAP 28(j)) filed by Respondent Michael B Mukasey. [6119893-1] [07-61006] (PAC)
10/02/2008	Response/opposition filed by Petitioner Jose Angel Carachuri-Rosendo to the FRAP 28(j) [6119893-1] by Respondent Michael B Mukasey Date of COS: 10/1/08 Sufficient [Y/N]: Y [6127734-1] [07-61006] (PAC)
11/03/2008	Response/opposition filed by Amicus Curiae New York St Assn to Rule 28(j) letter [6119893-1] by Respondent Michael B Mukasey

Date	Docket Text
	Date of COS: 10/31/08 Sufficient [Y/N]: Y [6150406-1] [07-61006] (PAC)
11/24/2008	Supplemental authorities (FRAP 28(j)) filed by Petitioner Jose Angel Carachuri-Rosendo. [6164579-1] [07-61006] (PAC)
12/03/2008	Supplemental authorities (FRAP 28(j)) filed by Amicus Curiae New York St Assn. [6169611-1] [07-61006] (PAC)
03/23/2009	CASE CALENDARED for oral argument on 04/27/2009 in the West Courtroom in New Orleans. [07-61006] (PFT)
04/03/2009	UNOPPOSED MOTION filed by Amicus Curiae New York State Defenders Association to participate in oral argument [6250298-2]. [07-61006] (PFT)
04/07/2009	COURT ORDER granting motion participate in oral argument filed by Amicus Curiae New York State Defenders Association [6250298-2] [07-61006] (PFT)
04/27/2009	ORAL ARGUMENT HEARD before Judges Jones, King, Elrod. Arguing Person Information Updated for: Ada Elsie Bosque arguing for Respondent Jr. Holder, U. S. Attorney General; Arguing Person Information Updated for: Lawrence Erik Rushton arguing for Petitioner Jose Angel Carachuri-Rosendo; Arguing Person Information

Date	Docket Text
	Updated for: James Walden arguing for Amicus Curiae New York State Defenders Association [07-61006] (SME)
05/20/2009	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Amicus Curiae New York State Defenders Association [07-61006] (MLF)
05/29/2009	PUBLISHED OPINION FILED. [07-61006 Affirmed] Judge: EHJ , Judge: CDK , Judge: JWE Mandate pull date is 07/20/2009 [07-61006] (JMA)
05/29/2009	JUDGMENT ENTERED AND FILED. [07-61006] (JMA)
07/21/2009	SUPREME COURT NOTICE that petition for writ of certiorari [6326825-2] was filed by Petitioner Mr. Jose Angel Carachuri-Rosendo on 07/15/2009. Supreme Court Number: 09-60. [07-61006] (CAV)
07/21/2009	MANDATE ISSUED. Mandate pull date satisfied. [07-61006] (MLF)
12/22/2009	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Petitioner Mr. Jose Angel Carachuri-Rosendo in 07-61006 on 12/14/2009. [6434782-1] [07-61006] (LGL)
12/23/2009	CERTIFIED RECORD ON APPEAL TRANSMITTED to United States Supreme Court on 12/23/2009. 5th Circuit Volumes Transmitted: 2. [07-61006] (PAC)

APPENDIX B

IMMIGRANT VISA AND ALIEN REGISTRATION

<table>
<tr><td colspan="2">OPTIONAL FORM 155A, (REV 6-910) DEPT. OF STATE</td><td colspan="2">NSN 7540-01-126-7761</td><td>50155-204</td></tr>
<tr><td colspan="2"></td><td colspan="2">IMMIGRANT VISA AND ALIEN REGISTRATION</td><td>IV- (Alien Registration Number)
☐ THE IMMIGRANT HAS BEEN PREVIOUSLY IN THE UNITED STATES</td></tr>
<tr><td>OF:</td><td>(Family Name)
CARACHU-RI ROSENDO</td><td>(First Name)
JOSE ANGEL</td><td>(Middle Name)</td><td>INS FILE #, IF KNOWN</td></tr>
<tr><td colspan="2">ACTION BY IMMIGRA-TION INSPECTOR

U.S. IMMIGRA-TION 450 ELP 86</td><td colspan="2">THE IMMIGRANT NAMED ABOVE ARRIVED IN THE UNITED STATES VIA (Name of vessel or flight no. of arrival)

PASO DEL NORTE BRIDGE EL PASO, TEXAS</td><td>INELIGIBILITY FOR VISA WAIVED UNDER SECTION

☐ 212(e)
☐ 212(h)
☐ 212(g)
☐ 212(i)</td></tr>
</table>

MAR 18 1993 **[ILLEG-IBLE]**	CITY AND COUNTRY OF BIRTH ACAPULCO, MEXICO (COUNTRY)	MO-DAY-YR OF BIRTH (DATE)
	CITY AND COUNTRY OF LAST RESIDENCE ACAPULCO, MEX	NATIONALITY MEXICAN
	MARITAL STATUS M S W D SEP ☐ ☒ ☐ ☐ ☐	MOTHER'S FIRST NAME ALEJANDRA
		FATHER'S FIRST NAME ANGEL

FINAL ADDRESS IN THE UNITED STATES	STREET ADDRESS, INCLUDE-IN CARE OF & APT# IF APPLICABLE (HOME ADDRESS)	CITY, STATE, AND ZIP CODE (HOME ADDRESS)

SEC. 212(a)(5)(A) LABOR CERTIFICATION ☐ NOT APPLICABLE ☒ NOT REQUIRED ☐ ATTACHED	OCCUPA-TION STC STU-DENT	SEX M ☒ F ☐

This visa is issued under Section 221 of the Immigration and Nationality Act, and upon the basis of the facts stated in the application. Possession of a visa does not entitle the bearer to enter the United States if at the time he seeks to enter he is found to be inadmissible. Upon arrival in the United States, it must be surrendered to a United States Immigration Officer.

AMERICAN CONSULATE GENERAL AT CD	**IMMIGRANT CLASSIFICATION**
	CLASSIFICATION SYMBOL FX2
	FOREIGN STATE/OTHER ARES

JUAREZ, CHIH., MEXICO s/S Aguirre Consular Officer of the United States of America [PHOTOGRAPH OF PETITIONER]	LIMITATION MEXICO (COUNTRY)	
	CDJ199118426402 (Alien Registration Number)	
	Issued on (Day) (Month) (Year) 18MAR1993	
	THE VALIDITY OF THIS VISA EXPIRES MIDNIGHT AT THE END OF (Day) (Month) (Year) 15JUL1993	
	PASSPORT	
	No. (Redacted)	
	OR OTHER TRAVEL DOCUMENTS (Describe)	
	RESERVED	
Tariff No. 21 Fee Paid $ _____ Or Local Currency Equivalent		IV-(Alien Registration Number)

ACTION OF I.J.	ACTION ON APPEAL	U.S.P.H.S.
		Info given to IRS on date of 1-551 Issuance: Name, Addr, DOB, A#, Class of Adm, Occup & answers to Form 9003

APPENDIX C

2004 CRIMINAL INFORMATION

		D.A. LOG NUMBER: **101644**
THE STATE OF TEXAS VS.		CJIS TRACKING NO.: **9035386353-A001**
JOSE ANGEL CARACHURI	SPN: (REDACTED)	BY: **DP**
		DA NO: **001827359**
(HOME ADDRESS)	DOB: **(DATE)**	AGENCY: **HPD**
	DATE PREPARED: **10/22/2004**	O/R NO: **160635604C**
		ARREST DATE: **10-21-04**
NCIC CODE: **3562 10**	RELATED CASES:	

MISDEMEANOR CHARGE:	**POSSESSION OF MARIHUANA**	
CAUSE NO.	1265315	BAIL: **$1,500**
		PRIOR CAUSE NO:

HARRIS COUNTY CRIMINAL COURT AT LAW NO: 10

FIRST SETTING DATE: 10/29/04

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

Comes now the undersigned Assistant District Attorney of Harris County, Texas on behalf of the State of Texas, and presents in and to the County Criminal Court at Law No. _____ of Harris County, Texas, that in Harris County, Texas, **JOSE ANGEL CARACHURI,** hereafter styled the Defendant, heretofore on or about **OCTOBER 21, 2004**, did then and there unlawfully intentionally and knowingly possess marihuana in a useable quantity of under two ounces.

Before the commission of the offense alleged above, on SEPTEMBER 5, 2003, in Cause No. 1187915 in the COUNTY CRIMINAL COURT AT LAW NO. 10 of HARRIS County, Texas, the Defendant was convicted of the MISDEMEANOR OFFENSE OF ASSAULT.

V5044 P0020

[Illegible time stamp]

AGAINST THE PEACE AND DIGNITY OF THE STATE.

s/[illegible] 24035148

ASSISTANT DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS.

BAR CARD NO.

INFORMATION

APPENDIX D

2004 JUDGMENT

[Texas state seal]

JUDGMENT ON PLEA OF GUILTY/NOLO CONTENDERE/NOT GUILTY BEFORE WAIVER OF JURY TRIAL

CAUSE NO. 1265315

THE STATE OF TEXAS
VS.
Jose Angel Carachuri
(Name of Defendant)
AKA_____

IN THE _____ DISTRICT COURT
COUNTY CRIMINAL COURT AT LAW NO. 10
OF HARRIS COUNTY, TEXAS

Date of Judgment:	Date Sentence Imposed:	Sentence to Begin:	Date of Offense:
OCT 28 2004	OCT 28 2004	OCT 28 2004	10-21-04

Attorney for State: P Danico

Attorney for Defendant: C Uhran ☐ Defendant Waived Counsel

Offense Convicted of: Possession of Marihuana 0-2 oz

☒ A MISDEMEANOR, CLASS ☐ A FELONY, DEGREE

A	**B**	C	SJ	3rd	2nd	1st	CAPITAL

Terms of Plea Bargain (In Detail):

20 days HCJ 8 days credit
abandon enhancement

Plea to Enhancement Paragraph(s):	1st Paragraph	2nd Paragraph	Charging Instrument:
	True	True	Complaint
	Not True	Not True	Indictment
	N/A	**N/A**	**Information**

Findings on Enhancement(s)	1st Paragraph	2nd Paragraph	Plea:
	True	True	**Guilty**
	Not True	Not True	Nolo Contendere
	N/A	**N/A**	Not Guilty

Affirmative Findings

Deadly Weapon:	Family Violence:	Victim Selected by Bias/ Prejudice:	Victim Younger Than 17 years:	Controlled Substance Used to Commit Crime:
Yes	Yes	Yes	Yes	Yes
No	No	No	No	No
N/A	**N/A**	**N/A**	**N/A**	**N/A**

Punishment Imposed and Place of Confinement:	(Mark all that apply)	
20 days	☐ Institutional Division, TDCJ ☐ State Jail Division, TDCJ ☒ Harris County Jail	☐ Sentence suspended, Defendant placed on community supervision for _____
Fine in the Amount of $ _____	☐ Fine Only	☐ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

Time Credited:	days toward incarceration	days toward fine and costs	days toward incarceration, fine and costs	COURT COSTS $ 201.00
_____	_____	8	_____	

(Mark appropriate selections below, if applicable)

☐ Name changed from _____

☐ Judgment Addendum incorporated herein by reference.

☒ Driver's license is suspended for a period of 6 days/**months**/years.

☐ The Defendant is entitled to _____ days credit toward suspension of driver's license.

☐ It is ORDERED by the Court, that any weapon(s) seized in this case is/are hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 13(h), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(a), Penal Laws

of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

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Combined\Judgment\
Straight

[Texas state seal]

This cause being called for trial, in Harris County, Texas, unless otherwise referenced, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above; or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above in writing in open court, and both parties announced ready for trial. The Defendant waived his right of trial by jury, and pleaded as indicated above. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the Court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the consequences of his plea; the plea is hereby received by the Court and entered of record. The Court having heard the evidence submitted found the Defendant guilty of the offense indicated above. The Defendant was granted the right of allocution and answered nothing in bar thereof. The Court proceeded in the presence of the Defendant to pronounce sentence against the Defendant.

IT IS ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, and that the Defendant committed the offense on the date indicated above, and that the Defendant be punished as indicated above for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution for which execution will issue. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable

provisions of Art. 42.12, Sec. 9, Code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is Confinement in the Harris County Jail that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas; unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail as required by law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause; unless the Court orders the

Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law; or as indicated above.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on
OCT 28 2004

Xs/Sherman A. Ross

Sherman A. Ross
JUDGE PRESIDING

Community Supervision Expires on: _____

Notice of Appeal:

_____

Mandate Received:

_____

After Mandate Received, Sentence to Begin Date is:

_____

Entered [illegible]

Verified _____

LCBT [illegible]

LCBU _____

Received on _____

at _____ AM | PM.
Sheriff, Harris County,
Texas

By: _____
Deputy

[Thumbprint]

Right Thumbprint

SPECIAL INSTRUCTIONS OR NOTES:

_____

_____

_____

:\FormalLib\Crim\Crts\
Combined\Judgment\
Straight

STATE OF TEXAS
COUNTY OF HARRIS

I, Charles Bacarisse, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date. Witness my official hand and seal of office this SEP 14 2006

[Harris County Court Seal]

CHARLES BACARRISE
DISTRICT CLERK
HARRIS COUNTY
TEXAS
s/D Perez Deputy

APPENDIX E

2005 CRIMINAL INFORMATION

		D.A. LOG NUMBER: **1107947**
THE STATE OF TEXAS VS.		CJIS TRACKING NO.: **9036521475-A001**
JOSE ANGEL CARACHURI	SPN: (REDACTED)	BY: **RM** DA NO: **002085366**
(HOME ADDRESS)	DOB: **(DATE)**	AGENCY: **HPD**
	DATE PREPARED: **11/14/2005**	O/R NO: **172559405**
		ARREST DATE: **11-14-05**
NCIC CODE: **5599 11**	RELATED CASES:	

MISDEMEANOR CHARGE: **POSSESSION OF A CONTROLLED SUBSTANCE**

CAUSE NO. 1338995 BAIL: **$2500**

PRIOR CAUSE NO:

HARRIS COUNTY CRIMINAL COURT AT LAW NO: 15

FIRST SETTING DATE: 11/21/05

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS

Comes now the undersigned Assistant District Attorney of Harris County, Texas on behalf of the State of Texas, and presents in and to the County Criminal Court at Law No. ____ of Harris County, Texas, that in Harris County, Texas, **JOSE ANGEL CARACHURI,** hereafter styled the Defendant, heretofore on or about **NOVEMBER 14, 2005**, did then and there unlawfully intentionally and knowingly possess a controlled substance, namely, ALPRAZOLAM, weighing less than 28 grams by aggregate weight, including any adulterants and dilutants.

Before the commission of the offense alleged above, on SEPTEMBER 5, 2003, in Cause No. 1187915 in the COUNTY CRIMINAL COURT AT LAW NO. 10 of

HARRIS County, Texas, the Defendant was convicted of the MISDEMEANOR OFFENSE OF ASSAULT.

[illegible]
05 NOV 14 AM:10:06

BY [illegible]
Deputy

AGAINST THE PEACE AND DIGNITY OF THE STATE.

s/[illegible] 04832900

ASSISTANT DISTRICT ATTORNEY OF HARRIS COUNTY, TEXAS.

BAR CARD NO.

INFORMATION

APPENDIX F

2005 JUDGMENT

[Texas state seal]

JUDGMENT ON PLEA OF GUILTY/NOLO CONTENDERE/NOT GUILTY BEFORE WAIVER OF JURY TRIAL

CAUSE NO. 1338995

THE STATE OF TEXAS
VS.
Jose Angel Carachuri
(Name of Defendant)
AKA _____

IN THE ____ DISTRICT COURT
COUNTY CRIMINAL COURT AT LAW NO. 15
OF HARRIS COUNTY, TEXAS

Date of Judgment:	Date Sentence Imposed:	Sentence to Begin:	Date of Offense:
NOV 15, 2005	NOV 15, 2005	NOV 15, 2005	11-14-05

Attorney for State: S. Allen

Attorney for Defendant: R. Cruz ☐ Defendant Waived Counsel

Offense Convicted of: Poss of a controlled substance

☒ A MISDEMEANOR, CLASS

A	B	C

☐ A FELONY, DEGREE

SJ	3rd	2nd	1st	CAPITAL

Terms of Plea Bargain (In Detail):

10 days HCJ 2 days credit
Abandon enhancement P.

Plea to Enhancement Paragraph(s):	1st Paragraph	2nd Paragraph	Charging Instrument:
	True	True	Complaint
	Not True	Not True	Indictment
	N/A	**N/A**	**Information**

Findings on Enhancement(s)	1st Paragraph	2nd Paragraph	Plea:
	True	True	Guilty
	Not True	Not True	**Nolo Contendere**
	N/A	**N/A**	Not Guilty

Affirmative Findings				
Deadly Weapon:	Family Violence:	Victim Selected by Bias/ Prejudice:	Victim Younger Than 17 years:	Controlled Substance Used to Commit Crime:
Yes	Yes	Yes	Yes	Yes
No	No	No	No	No
N/A	**N/A**	**N/A**	**N/A**	**N/A**

Punishment Imposed and Place of Confinement:	(Mark all that apply)	
10 days	☐ Institutional Division, TDCJ ☐ State Jail Division, TDCJ ☒ Harris County Jail	☐ Sentence suspended, Defendant placed on community supervision for _____
Fine in the Amount of $ _____	☐ Fine Only	☐ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

Time Credited:	days toward incarceration	days toward fine and costs	days toward incarceration, fine and costs	COURT COSTS $ 210.00
_____	_____	2	_____	

(Mark appropriate selections below, if applicable)

☐ Name changed from _____

☐ Judgment Addendum incorporated herein by reference.

☒ Driver's license is suspended for a period of 6 days/**months**/years.

☐ The Defendant is entitled to _____ days credit toward suspension of driver's license.

☐ It is ORDERED by the Court, that any weapon(s) seized in this case is/are hereby forfeited.

☐ Educational program waived in accordance with Article 42.12 Sec. 13(h), upon a finding of good cause by the Court.

☐ In accordance with Section 12.44(a), Penal Laws

of Texas, the Court finds that the ends of justice would best be served by punishment as a Class A misdemeanor. The Defendant is adjudged to be guilty of a state jail felony and is assessed the punishment indicated above.

☐ In accordance with Section 12.44(b), Penal Laws of Texas, the Court authorizes the prosecuting attorney to prosecute this cause as a Class A misdemeanor. The Defendant is adjudged to be guilty of a Class A misdemeanor and is assessed the punishment indicated above.

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Combined\Judgment\
Straight

[Texas state seal]

This cause being called for trial, in Harris County, Texas, unless otherwise referenced, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above; or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above in writing in open court, and both parties announced ready for trial. The Defendant waived his right of trial by jury, and pleaded as indicated above. Thereupon, the Defendant was admonished by the Court as required by law. It appearing to the Court that the Defendant is mentally competent to stand trial, that the plea is freely and voluntarily made, and that the Defendant is aware of the consequences of his plea; the plea is hereby received by the Court and entered of record. The Court having heard the evidence submitted found the Defendant guilty of the offense indicated above. The Defendant was granted the right of allocution and answered nothing in bar thereof. The Court proceeded in the presence of the Defendant to pronounce sentence against the Defendant.

IT IS ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, and that the Defendant committed the offense on the date indicated above, and that the Defendant be punished as indicated above for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution for which execution will issue. Further, the Court finds the Presentence Investigation, if so ordered, was done according to the applicable

provisions of Art. 42.12, Sec. 9, Code of Criminal Procedure.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Institutional Division or the State Jail Division of the Texas Department of Criminal Justice (TDCJ) that the Defendant be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division or the State Jail Division, TDCJ, or any other person legally authorized to receive such convicts, and said Defendant shall be confined in the Institutional Division or State Jail Division, TDCJ for the period indicated above, in accordance with the provisions of the law governing the Institutional Division or State Jail Division, TDCJ. The Defendant is remanded to the custody of the Sheriff of Harris County until said Sheriff can obey the directions of this sentence.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is Confinement in the Harris County Jail that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas; unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail as required by law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause; unless the Court orders the

Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law; or as indicated above.

IT IS ORDERED by the Court that the sentence indicated above is to be executed, unless it is indicated above that the sentence is to be suspended, and if so, the Defendant is placed on community supervision for the period indicated above pending his abiding by and not violating the terms and conditions of his community supervision.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on
NOV 15 2005

Xs/Neel Richardson

Neel Richardson
Judge Presiding

Community Supervision
Expires on: _____

Notice of Appeal:

_____

Mandate Received:

_____

After Mandate Received,
Sentence to Begin Date is:

_____

Entered [illegible]

Verified [illegible]

LCBT _____

LCBU [illegible]

Received on _____

at _____ AM | PM.
Sheriff, Harris County,
Texas

By: _____
Deputy

[Thumbprint]

Right Thumbprint

SPECIAL INSTRUCTIONS OR NOTES:

_____

_____

_____

:\FormalLib\Crim\Crts\
Combined\Judgment\
Straight

[Harris County
Court Seal]

I, Charles Bacarisse,
District Clerk of Harris
County, Texas, certify
that this a true and
correct copy of the
original record filed and
or recorded in my office,
electronically or hard
copy, as it appears on
this date
Witness my official hand
and seal of office this
September 14, 2006

Certified Document
Number: 17416007
(Total Pages 2)

s/Charles Bacarisse

CHARLES BACARISSE,
DISTRICK CLERK
HARRIS COUNTY,
TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated document are valid. If there is a question regarding the validity of this document and or seal please email support@dco.co.harris.tx.us

APPENDIX G

RECORD OF DEPORTABLE/INADMISSIBLE ALIEN - FORM I-213

<table>
<tr><td colspan="3">U.S. Department of Justice

Immigration and Naturalization Service</td><td>Record of Deportable/ Inadmissible Alien</td></tr>
<tr><td colspan="3">Family Name (CAPS) First Middle
CARACHURI-ROSENDO, Jose Angel</td><td>Sex M
Hair BLK
Eyes BRO
Cmplxn MED
Height 67
Weight 160
Occupation</td></tr>
<tr><td>Country of Citizenship
MEXICO</td><td>Passport Number and Country of Issue</td><td>File Number Case No: XGA060900 0023 (Alien Registration Number)</td><td>Scars and Marks
See Narrative</td></tr>
<tr><td colspan="3">U.S. Address (Home Address)</td><td>F.B.I. Number (F.B.I. Number)</td></tr>
</table>

Date, Place, Time, and Manner of Last Entry **03/19/1983, Unknown Time, ELP, IMMIGRANT**		Passenger Boarded at	☐ Single ☐ Divorced ☐ Married ☐ Widower ☐ Separated
Number, Street, City, Province (State) and Country of Permanent Residence			Method of Location/ Apprehension **CLC 511.2.3**
Date of Birth **(DATE)** **Age: 28**	Date of Action **09/14/2006**	Location Code **XHO/XGA**	At/Near **ANAHUAC, TEXAS** Date/Hour **09/14/2006 0000**
City, Province (State) and Country of Birth **IXTAPILLA, GUERRORO, MEXICO**	AR ☒	Form (Type and No.) Lifted ☐ Not Lifted ☐	By **EDUARDO SILVA JR** Status at Entry **Immigrant**
NIV Issuing Post and NIV Number	Social Security Account Name		Status When Found **IN INSTITUTION**
Date Visa Issued	Social Security Number **(Redacted)**		Length of Time Illegally in U.S. **NOT APPLICABLE**
Immigration Record **POSITIVE - See Narrative**		Criminal Record **See narrative**	

Name, Address, and Nationality of Spouse (Maiden Name, if Appropriate)			Number and Nationality of Minor Children **NONE CLAIMED.**
Father's Name, Nationality, and Address, if Known **CARACHURI, Angel HOUSTON, TEXAS Nationality: MEXICO**		Mother's Present and Maiden Names, Nationality, and Address, if Known **ROSENDO, Alejandra HOUSTON, TEXAS Nationality: MEXICO**	
Monies Due/Property in U.S. Not in Immediate Possession	Finger-printed? ☒ Yes ☐ No	INS Systems Checks **See Narrative**	Charge Code Word(s) **R2B1**
Name and Address of (Last)/(Current) U.S. Employer	Type of Employment	Salary Hr.	Employed from/to

Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place, and manner of last entry, attempted entry, or any other entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.)

SCARS, MARKS AND TATTOOS

None Indicated

[Illegible File Stamp]

INS SYSTEMS CHECKS

Central Index System Positive
National Crime Information Center Positive

OCT 12 2006

Narrative Title: Record of Deportable/Excludable Alien
Narrative Created by HAND

Subject was encountered when released from the Chambers County Detention Facility after his arrest for traffic violations. The Subject admitted to being a citizen of Mexico and to entering the United States as noted above. The Subject appears to be in good health and makes no claim to prior service in the United States Military. Checks of the Central Index System revealed that the Subject was admitted as an Immigrant. CRIMINAL HISTORY: Checks of the National Crime Information Center revealed that the Subject was previously convicted of Driving While License Suspended on 07/11/00 in the County Criminal Court at Law #11 at Harris County, Texas and sentenced to 3 days confinement. The Subject was also convicted of Assault on 09/05/03 in the County Criminal Court at Law #10 at Harris County, Texas and sentenced to 15 days confinement. The Subject was also convicted of Possession of Marijuana on 10/28/04 in the County

Alien has been advised of communication privileges. **09-14-06 s/[illegible]** (Date/Initials)	**EDWARD A. HAND** **SENIOR SPECIAL AGENT** **s/Edward A. Hand** (Signature and Title of INS Official)
Distribution: **FILE** **LEGAL** **D&R**	Received: (Subject and Documents) (Report of Interview) Officer: **EDWARD A. HAND** on: **September 14, 2006** at _____ (time) Disposition: **Warrant of Arrest/Notice to Appear** Examining Officer: **JENNIFER HAVIES** **s/Jennifer Havies**

U.S. Department of Justice

Immigration and Naturalization Service

Continuation Page for Form I-213

Alien's Name	File Number	Date
CARACHURI-ROSENDO Jose Angel	**Case No. XGA0609000023 (Alien Registration Number)**	**09/14/2006**

Criminal Court at Law #10 at Harris County, Texas and sentenced to 20 days confinement. The Subject was also convicted of Driving While License Invalid on 12/14/05 in the County Court at Chambers County, Texas and given deferred adjudication. The Subject was also convicted of Possession of a Controlled Substance PG3 <28 grams, to wit: Alprazolam on 11/15/05 in the County Criminal Court at Law #15 at Harris County, Texas and sentenced to 10 days confinement.

Signature	Title
EDWARD A. HAND s/Edward A. Hand	SENIOR SPECIAL AGENT

APPENDIX H

NOTICE TO APPEAR

U.S. Department of Justice

Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No. (Alien Registration Number)
Case No. XGA0609000023

In the Matter of:

Respondent: ✓Jose Angel CARACHURI-ROSENDO
currently residing at:

(Home Address) _____ _____
(Number, street, city state and ZIP code) (Area Code and phone number)

☐ 1. You are an arriving alien.
☐ 2. You are an alien present in the United States who has not been admitted or paroled.
☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

06 OCT -3 AM 7:51 [Illegible time stamp]

See Continuation Page Made a Part Hereof

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to:

☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: 5520 GREENS ROAD, HOUSTON, TEXAS 77032

(Complete Address of Immigration Court, Including Room Number, if any)

on a date to be set (Date) at a time to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

Date: September 14, 2006

s/Jennifer Havies
JENNIFER HAVIES
SUPERVISORY
SPECIAL AGENT
(Signature and Title of Issuing Officer)

HOUSTON, TEXAS
(City and State)

See reverse for important information

Form I-862 (Rev. 3/22/99)N

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to

Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of you hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an

immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

_____
(Signature of Respondent)

Before:

_____ Date:_____
(Signature and Title of INS Officer)

Certificate of Service

This Notice to Appear was served on the respondent by me on September 14, 2006, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organizations and attorneys which provide free legal services.

[finger print]

The alien was provided oral notice in the ENGLISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

s/illegible	EDWARD A. HAND SENIOR SPECIAL AGENT s/Edward A. Hand
(Signature of Respondent if Personally Served)	(Signature and Title of Officer)

Form I-862 (Rev. 3/22/99)N

U.S. Department of Justice

Immigration and Naturalization Service

Continuation Page for Form I-862

Alien's Name	File Number	Date
Jose Angel CARACHURI-ROSENDO	**Case No. XGA0609000023** (Alien Registration Number)	**September 14, 2006**

The Service alleges that you:

A 1) You are not a citizen or national of the United States;

A 2) You are a native of MEXICO and a citizen of MEXICO;

A 3) You were admitted to the United States at EL PASO, TEXAS on or about March 19, ~~1983~~ as an IMMIGRANT; 1993—amended by DHS, per Mr Evans, 27 Nov 06

A 4) You were, on 10/28/2004, convicted in the County Criminal at Law No. 10 at Harris County, Texas for the offense of Possession of Marijuana.

A 5) You were, on 09/05/03, convicted in the County Criminal Court at Law No. at Harris County, Texas for the offense of Possession of a Controlled Substance PG 3<28 grams, to wit: alprazolam.

On the basis of the foregoing, it is charged that you are subject to removal from the United

States pursuant to the following provision(s) of law:
F Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law of regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

Signature	Title
JENNIFER HAVIES s/Jennifer Havies	SUPERVISORY SPECIAL AGENT

APPENDIX I

TRANSCRIPT OF IMMIGRATION HEARING OCTOBER 26, 2006

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

Matter of	File (Alien Registration Number)
JOSE ANGEL CARACHURI-ORSENDO Respondent	In REMOVAL Proceedings Transcript of Hearing

Before JIMMIE LEE BENTON, Immigration Judge

Date: October 26, 2006 Place: Houston, Texas

Transcribed by FREE STATE REPORTING, INC., at Annapolis, Maryland

Official Interpreter: Juan Herrerra

Language: Spanish

Appearances:

For the Department of Homeland Security:	For the Respondent:
James Manning	Pro se

[9]

JUDGE FOR THE RECORD

This is Immigration Judge Jimmie Benton sitting in Houston, Texas. Today is October 26, 2006. This is a continuation of removal proceedings for respondent Jose Angel Carachuri-Orsendo, file (Alien Registration Number). Respondent's present. He's not represented by counsel. The Government's represented by Mr. James Manning and the interpreter in the Spanish language won't be needed.

JUDGE TO MR. CARACHURI-ORSENDO

Mr. Carachuri?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

Please stand and tell me your name.

MR. CARACHURI-ORSENDO TO JUDGE

Jose Carachuri-Orsendo.

JUDGE TO MR. CARACHURI-ORSENDO

Do you have an attorney to represent you today?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Are you going to get an attorney?

MR. CARACHURI-ORSENDO TO JUDGE

Sir, it doesn't seem like I'm going to be getting one.

JUDGE TO MR. CARACHURI-ORSENDO

In that case, you must speak for yourself. Are you a

[10]

citizen of the United States?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

In which country were you born?

MR. CARACHURI-ORSENDO TO JUDGE

Mexico.

JUDGE TO MR. CARACHURI-ORSENDO

Did you immigrate to the United States in 1983?

MR. CARACHURI-ORSENDO TO JUDGE

Yes, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Were you convicted on October, 2004 in Harris County, Texas for possession of marijuana?

MR. CARACHURI-ORSENDO TO JUDGE

Yes I was.

JUDGE TO MR. CARACHURI-ORSENDO

Were you convicted in September, 2003, in Harris County, Texas for possession of alprazolam?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

Was there a street name for that? Alprazolam?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir. That was just given to me by a friend.

[11]

JUDGE TO MR. CARACHURI-ORSENDO

You don't know what, what it was? You didn't know what it was, huh?

MR. CARACHURI-ORSENDO TO JUDGE

No. (indiscernible) for pain.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. Pain. All right, sir. How old are you?

MR. CARACHURI-ORSENDO TO JUDGE

28 years old.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. Is your mother a citizen of the United States?

MR. CARACHURI-ORSENDO TO JUDGE

No, she's a resident.

JUDGE TO MR. CARACHURI-ORSENDO

Is your father a citizen of United States?

MR. CARACHURI-ORSENDO TO JUDGE

Yes he is.

JUDGE TO MR. CARACHURI-ORSENDO

And when did he become a citizen?

MR. CARACHURI-ORSENDO TO JUDGE

That I'm not so sure.

JUDGE TO MR. CARACHURI-ORSENDO

All right. You know what, I asked you that back on October 12th and you told me the same thing.

MR. CARACHURI-ORSENDO TO JUDGE

[12]

Yes, sir.

JUDGE TO MR. CARACHURI-ORSENDO

No contact with your father?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

All right. And there's no evidence that you are a citizen of the United States. The Court finds that the evidence is clear and convincing, however, that you have been convicted of a controlled substance violation based upon either or both of your convictions for possession of marijuana and possession of alprazolam, A L P R A Z O L A M. Now, the way the Government has charged you, sir, you appear to be eligible to seek a second chance to reside in the United States as a lawful permanent resident. To, to take advantage of this opportunity, you have to file with the Court a written application on a form that the Court will provide to you. Do you want to file that application with the Court?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Yes, sir. Because you have been a lawful

permanent resident for a long time, and because you have not been convicted of what the law identifies as an aggravated felony, you have the right to ask this Court to allow you to keep your lawful permanent

[13]

resident status and to be released as a permanent resident of the United States. To do so, you have to submit a written application to the Court. Do you want to file that application with the Court?

MR. CARACHURI-ORSENDO TO JUDGE

Yes I will, sir.

JUDGE TO MR. CARACHURI-ORSENDO

All right. So, we're going to give you the application to file with the Court and have you come back one week from today. That will be November 2nd, 2006 to file the application in Court. Once you return to Court with the application, I'll give you further instructions on what you will need to do to properly file the application. Also, I'll tell you what to expect at the hearing because once you file the application, I will schedule you for a hearing for about three weeks later to actually determine whether or not you deserve a second chance. All right. So, the first thing I need you to do is fill out the application. Well, let's see here. You speak English.

MR. CARACHURI-ORSENDO TO JUDGE

Excuse me, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Yes, sir?

MR. CARACHURI-ORSENDO TO JUDGE

If I may ask, when that, that person (indiscernible) guilty (indiscernible).

[14]

JUDGE TO MR. CARACHURI-ORSENDO

You're going to be detained by the Government until we determine whether or not you should be deported or given a second chance. Now, you speak English and you read and write English as well, sir?

MR. CARACHURI-ORSENDO TO JUDGE

Yes, sir.

JUDGE TO MR. CARACHURI-ORSENDO

So, maybe you can fill out the application a lot faster than one week. Maybe we can have you come back on Monday.

MR. CARACHURI-ORSENDO TO JUDGE

This Monday?

JUDGE TO MR. CARACHURI-ORSENDO

Yes, sir. So, you have over the weekend to complete it. So, we'll have you come back on the 30th of October. You have any questions, sir?

MR. CARACHURI-ORSENDO TO JUDGE

Not at this time, sir.

JUDGE TO MR. MANNING

Mr. Manning, anything further from the Government?

MR. MANNING TO JUDGE

No, Your Honor.

JUDGE FOR THE RECORD

Matter's continued as indicated.

HEARING CONTINUED

APPENDIX J

TRANSCRIPT OF IMMIGRATION HEARING NOVEMBER 27, 2006

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

Matter of	File (Alien Registration Number)
JOSE ANGEL CARACHURI-ORSENDO	In REMOVAL Proceedings
Respondent	Transcript of Hearing

Before JIMMIE LEE BENTON, Immigration Judge

Date: November 27, 2006 Place: Houston, Texas

Transcribed by FREE STATE REPORTING, INC., at Annapolis, Maryland

Official Interpreter: Juan Herrerra

Language: Spanish

Appearances:

For the Department of Homeland Security:	For the Respondent:
Mark Evans	Pro se

[18]

JUDGE FOR THE RECORD

This is Immigration Judge Jimmie Benton sitting in Houston, Texas. The date is November 27, 2006. This is a continuation of removal proceedings for respondent Jose Angel Carachuri-Orsendo, file (Alien Registration Number). The respondent is present. He is not represented by counsel. The Government's represented by Mr. Mark Evans. The interpreter in the Spanish language, if needed, will be Mr. Juan Herrerra.

JUDGE TO MR. CARACHURI-ORSENDO

Sir, do you understand me speaking to you in English?

MR. CARACHURI-ORSENDO TO JUDGE

Yes, sir.

JUDGE TO MR. CARACHURI-ORSENDO

What is your name?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

All right, sir. I have your application for cancellation of removal. I'm going to return it to you at this time so that you can sign your name where I marked the X only if the information is accurate and complete to the best of your knowledge. Were you

expecting any witnesses today, sir?

MR. CARACHURI-ORSENDO TO JUDGE

Well, sir, my mother and my sister and my, my fiance were supposed to show up.

[19]

JUDGE TO MR. CARACHURI-ORSENDO

At 1 o'clock?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

All right. We'll, we'll, we'll continue the case until 1 o'clock. You can sign that and return to me and then we'll wait until 1 o'clock. Did you send a copy of your application to the Service Center like I asked you to?

MR. CARACHURI-ORSENDO TO JUDGE

Yes I did.

JUDGE TO MR. CARACHURI-ORSENDO

Did you get a response from them?

MR. CARACHURI-ORSENDO TO JUDGE

Well, as far as that I have a question due to the fact it was mailed (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

What was? All right. The response?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

All right.

MR. CARACHURI-ORSENDO TO JUDGE

The application itself and also she, she said that it mentioned that I still have to pay a $75 fee.

[20]

JUDGE TO MR. CARACHURI-ORSENDO

$70 for fingerprint.

MR. CARACHURI-ORSENDO TO JUDGE

Right.

JUDGE TO MR. CARACHURI-ORSENDO

Yeah. That's right.

MR. CARACHURI-ORSENDO TO JUDGE

And I was under the --

JUDGE TO MR. CARACHURI-ORSENDO

I'm not going to worry about that. You, you -- I just need to see a copy of the letter. Hopefully, your mother will bring a copy of that letter.

MR. CARACHURI-ORSENDO TO JUDGE

Well, she said she was going to bring the whole thing.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. Thank you.

JUDGE FOR THE RECORD

We're going to come back at 1 o'clock.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Okay. We're back on the record. We have the respondent's application. I've marked it as Exhibit No.4. There is no Exhibit No. 3 as of yet.

JUDGE TO MR. CARACHURI-ORSENDO

[21]

Sir, do you have any other documents you want the Court to look at at this time?

MR. CARACHURI-ORSENDO TO JUDGE

Just a form that you gave me to fill out --

JUDGE TO MR. CARACHURI-ORSENDO

Okay.

MR. CARACHURI-ORSENDO TO JUDGE

-- called waiver removal.

JUDGE TO MR. CARACHURI-ORSENDO

Thank you. Give that to Mr. Hightower (phonetic sp.).

JUDGE TO UNIDENTIFIED SPEAKER

Give that to Mr. Herrerra. Punch holes in that for me.

JUDGE TO MR. CARACHURI-ORSENDO

You have anything else, sir?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. All right. I'm going to start the questioning by asking you some questions about your life in the United States. How old are you?

MR. CARACHURI-ORSENDO TO JUDGE

28 years old, sir.

JUDGE TO MR. CARACHURI-ORSENDO

What year did you come to the United States?

MR. CARACHURI-ORSENDO TO JUDGE

[22]

1983.

JUDGE TO MR. CARACHURI-ORSENDO

Did you come legally or illegally?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Illegal? When did you become legal?

MR. CARACHURI-ORSENDO TO JUDGE

I believe it was in '83 or --

JUDGE TO MR. CARACHURI-ORSENDO

In '83? That's the same year you came in the United States.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Yeah. 1983 is when you became an immigrant according to the Notice to Appear. So, maybe you came to the United States legally.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) my parents.

JUDGE TO MR. CARACHURI-ORSENDO

Okay.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Not sure, huh? Where's your mother?

[23]

MR. CARACHURI-ORSENDO TO JUDGE

I thought she was going to be here.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. Well, maybe she is here. Is she -- where does she live?

MR. CARACHURI-ORSENDO TO JUDGE

She lives in Houston.

JUDGE TO MR. CARACHURI-ORSENDO

She lives in Houston?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

And what -- is she a U.S. citizen?

MR. CARACHURI-ORSENDO TO JUDGE

She's a resident.

JUDGE TO MR. CARACHURI-ORSENDO

Where's your father?

MR. CARACHURI-ORSENDO TO JUDGE

They're separated and I don't have (indiscernible), 18, 16 years old.

JUDGE TO MR. CARACHURI-ORSENDO

Where's he live now?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

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Did he ever get divorced?

MR. CARACHURI-ORSENDO TO JUDGE

I think he did.

JUDGE TO MR. CARACHURI-ORSENDO

He did?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. Do you have sisters?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

How many?

MR. CARACHURI-ORSENDO TO JUDGE

I have two.

JUDGE TO MR. CARACHURI-ORSENDO

Two sisters? How old?

MR. CARACHURI-ORSENDO TO JUDGE

One's 27 and the other one will be 25.

JUDGE TO MR. CARACHURI-ORSENDO

Where do they live?

MR. CARACHURI-ORSENDO TO JUDGE

The one that's 27 stays here in Houston and the other one stays (indiscernible) San Francisco.

JUDGE TO MR. CARACHURI-ORSENDO

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Are they U.S. citizens?

MR. CARACHURI-ORSENDO TO JUDGE

My 27 year old is. She became a citizen. As far as my other sister, (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

You have brothers?

MR. CARACHURI-ORSENDO TO JUDGE

No. I'm the only boy.

JUDGE TO MR. CARACHURI-ORSENDO

All right. And how long have you lived in Houston?

MR. CARACHURI-ORSENDO TO JUDGE

Ever since I (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Did you attend school here?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Did you finish high school?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Do you have a GED?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

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Have you ever been married?

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Okay. Back on the record after tape malfunction.

JUDGE TO MR. CARACHURI-ORSENDO

Are you married now?

MR. CARACHURI-ORSENDO TO JUDGE

No, not right now.

JUDGE TO MR. CARACHURI-ORSENDO

Are you divorced?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

How many times have you been married?

MR. CARACHURI-ORSENDO TO JUDGE

One time.

JUDGE TO MR. CARACHURI-ORSENDO

You have children?

MR. CARACHURI-ORSENDO TO JUDGE

Yes I do.

JUDGE TO MR. CARACHURI-ORSENDO

How many children?

MR. CARACHURI-ORSENDO TO JUDGE

I have four of them that would be with my fiance not with

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(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

You have children with your fiance?

MR. CARACHURI-ORSENDO TO JUDGE

Yes. I would say common law marriage.

JUDGE TO MR. CARACHURI-ORSENDO

How old are the children?

MR. CARACHURI-ORSENDO TO JUDGE

One's going to be 7. That would be the oldest and then (indiscernible) is 5 and then 4 and then 3.

JUDGE TO MR. CARACHURI-ORSENDO

Did you give me copies of their birth certificates?

MR. CARACHURI-ORSENDO TO JUDGE

No I didn't, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Why not?

MR. CARACHURI-ORSENDO TO JUDGE

I couldn't get (indiscernible) by the time I got (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Is your girlfriend here?

MR. CARACHURI-ORSENDO TO JUDGE

No. She, she couldn't make it.

JUDGE TO MR. CARACHURI-ORSENDO

She, she would probably have copies of those birth

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certificates, too.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) pretty sure (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Why don't you contact her?

MR. CARACHURI-ORSENDO TO JUDGE

Well, like I said, she was supposed to come but for some apparent reason she wasn't able to make it today.

JUDGE TO MR. CARACHURI-ORSENDO

Well, she could mail the birth certificates.

MR. CARACHURI-ORSENDO TO JUDGE

Well, yeah, I didn't think about it.

JUDGE TO MR. CARACHURI-ORSENDO

I see. And where have you -- what was the last job you had?

MR. CARACHURI-ORSENDO TO JUDGE

I have been a carpet installer ever since I was 17.

JUDGE TO MR. CARACHURI-ORSENDO

For the same company?

MR. CARACHURI-ORSENDO TO JUDGE

No. I work on and off with different people.

JUDGE TO MR. CARACHURI-ORSENDO

What was the last job you had?

MR. CARACHURI-ORSENDO TO JUDGE

The last person that I worked for would be I believe (indiscernible).

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JUDGE TO MR. CARACHURI-ORSENDO

How long did you work for that person?

MR. CARACHURI-ORSENDO TO JUDGE

When I (indiscernible), I was working for him for (indiscernible) but I had worked with him like I said previously on and off.

JUDGE TO MR. CARACHURI-ORSENDO

So, the last steady employment you had was for four months?

MR. CARACHURI-ORSENDO TO JUDGE

About four months for the same person. (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Before that, who's you work for?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Doing the same thing?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

How long did you work for him?

MR. CARACHURI-ORSENDO TO JUDGE

From '04 to '05.

JUDGE TO MR. CARACHURI-ORSENDO

Yeah. How many months did you work?

MR. CARACHURI-ORSENDO TO JUDGE

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(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

The year? Why do you keep changing jobs?

MR. CARACHURI-ORSENDO TO JUDGE

Because the job there, they worked on contract (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Do you own a house?

MR. CARACHURI-ORSENDO TO JUDGE

No.

JUDGE TO MR. CARACHURI-ORSENDO

Do you own a car?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Do you have a bank account?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Would it be safe to say you own no property?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

Where does your fiance live?

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MR. CARACHURI-ORSENDO TO JUDGE

Right now, since I've been incarcerated, she, she's been staying with her parents.

JUDGE TO MR. CARACHURI-ORSENDO

Where do you live?

MR. CARACHURI-ORSENDO TO JUDGE

While I was out, we was living at the time with my mom before I got incarcerated.

JUDGE TO MR. CARACHURI-ORSENDO

How is your health?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

How is your mother's health?

MR. CARACHURI-ORSENDO TO JUDGE

She, she suffers from diabetes. (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Does she take insulin, your mother, for her diabetes?

MR. CARACHURI-ORSENDO TO JUDGE

I would reckon so.

JUDGE TO MR. CARACHURI-ORSENDO

You don't know?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

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Okay. And how many times have you been arrested?

MR. CARACHURI-ORSENDO TO JUDGE

As far as the charges --

JUDGE TO MR. CARACHURI-ORSENDO

Arrests? Arrested by the police? Arrested by the police not by, not by, I'm not talking about the charges. I'm talking about how many times have you been arrested in the United States.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) three. I have three major charges. Other than that, I've lost count of, of, of arrests that I've had over traffic tickets.

JUDGE TO MR. CARACHURI-ORSENDO

Too many times to remember?

MR. CARACHURI-ORSENDO TO JUDGE

Traffic tickets, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Yeah. Most people don't get arrested for traffic

tickets unless you don't pay them. So, but, and then one time I think would be enough but you've got -- you have more than ten arrests?

MR. CARACHURI-ORSENDO TO JUDGE

No, I wouldn't say that.

JUDGE TO MR. CARACHURI-ORSENDO

How many would you say then?

MR. CARACHURI-ORSENDO TO JUDGE

I'd say about five maybe.

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JUDGE TO MR. CARACHURI-ORSENDO

For all the reasons, five arrests?

MR. CARACHURI-ORSENDO TO JUDGE

I would say --

JUDGE TO MR. CARACHURI-ORSENDO

All right.

MR. CARACHURI-ORSENDO TO JUDGE

-- but I'm not certain.

JUDGE TO MR. CARACHURI-ORSENDO

Now, traffic tickets and what else were you arrested for?

MR. CARACHURI-ORSENDO TO JUDGE

I was (indiscernible) arrests were for control of marijuana and also for control of controlled substance which was (indiscernible) because they charged me (indiscernible) --

JUDGE TC MR. CARACHURI-ORSENDO

How'd you get this pain reliever pill?

MR. CARACHURI-ORSENDO TO JUDGE

It was given by a friend. (indiscernible) and he just told me it was (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Sir, where were you? You weren't in his house when he gave you this pill, were you?

MR. CARACHURI-ORSENDO TO JUDGE

I was on my way to my house.

JUDGE TO MR. CARACHURI-ORSENDO

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He gave you the pill in the middle of the street?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Where, where did you he give you the pill?

MR. CARACHURI-ORSENDO TO JUDGE

Of course, he was at his house when he gave it to me.

JUDGE TO MR. CARACHURI-ORSENDO

And then you -- so, but you didn't take it at the house?

MR. CARACHURI-ORSENDO TO JUDGE

No. I--

JUDGE TO MR. CARACHURI-ORSENDO

Why didn't you take it then if you, it was for pain?

MR. CARACHURI-ORSENDO TO JUDGE

I just waited until I got home.

JUDGE TO MR. CARACHURI-ORSENDO

Unlikely story. Were you driving or walking?

MR. CARACHURI-ORSENDO TO JUDGE

I was walking. He's staying in the same apartments.

JUDGE TO MR. CARACHURI-ORSENDO

All right. So, how many times have you been convicted?

MR. CARACHURI-ORSENDO TO JUDGE

For, for --

JUDGE TO MR. CARACHURI-ORSENDO

For any reason? How many times have you been convicted?

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MR. CARACHURI-ORSENDO TO JUDGE

Like I said, I'm here about five times.

JUDGE TO MR. CARACHURI-ORSENDO

That was arrests. Every time you're arrested, they convicted you of a crime?

MR. CARACHURI-ORSENDO TO JUDGE

Well, --

JUDGE TO MR. CARACHURI-ORSENDO

Other than traffic tickets?

MR. CARACHURI-ORSENDO TO JUDGE

No. No. (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

So, that would be for what, once for marijuana and once for pain reliever?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

What was the other arrest for?

MR. CARACHURI-ORSENDO TO JUDGE

And the other one was for domestic violence on a family member.

JUDGE TO MR. CARACHURI-ORSENDO

With your fiance?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

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JUDGE TO MR. CARACHURI-ORSENDO

When was that?

MR. CARACHURI-ORSENDO TO JUDGE

I think that was in 2 --'03.

JUDGE TO MR. CARACHURI-ORSENDO

What family do you have in Mexico?

MR. CARACHURI-ORSENDO TO JUDGE

I don't have any, sir.

JUDGE TO MR. CARACHURI-ORSENDO

When was the last time you were in Mexico?

MR. CARACHURI-ORSENDO TO JUDGE

I haven't been back over there ever since I was brought over here by my parents.

JUDGE TO MR. CARACHURI-ORSENDO

How much time have you spent in jail since you've been in the United States?

MR. CARACHURI-ORSENDO TO JUDGE

All (indiscernible)?

JUDGE TO MR. CARACHURI-ORSENDO

Yes, sir.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) no more than, than five months altogether.

JUDGE TO MR. CARACHURI-ORSENDO

Do you know why you're being considered for deportation?

MR. CARACHURI-ORSENDO TO JUDGE
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Well, (indiscernible) controlled substance.

JUDGE TO MR. CARACHURI-ORSENDO

Well, let's see here. When did you realize you could be deported from the United States?

MR. CARACHURI-ORSENDO TO JUDGE

When I was brought (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

So, you thought you can violate the laws and not be deported?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir. I never thought of that.

JUDGE TO MR. CARACHURI-ORSENDO

Then what were you thinking when you were out there violating the drug laws of the United States and Texas?

MR. CARACHURI-ORSENDO TO JUDGE

Well, like I said, my, my one charge of marijuana, controlled substance, to be honest, I just wasn't using my head at the time, you know, and as far as (indiscernible) I did not know that I was (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Yeah. The law allows you one instance of marijuana use if the amount of marijuana is 30 grams or less. So, really the reason you're here is because of the controlled substance involving the alprazolam, the pain killer, combined with the marijuana at this time. So, you have on two occasions did what

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most people never do, use a controlled substance. Why is that? Why would you use marijuana?

MR. CARACHURI-ORSENDO TO JUDGE

I guess I wasn't thinking at the time, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Well, where did you get the marijuana from?

MR. CARACHURI-ORSENDO TO JUDGE

By a friend.

JUDGE TO MR. CARACHURI-ORSENDO

You paid for it?

MR. CARACHURI-ORSENDO TO JUDGE

No.

JUDGE TO MR. CARACHURI-ORSENDO

They gave it to you?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

You don't need friends like that.

MR. CARACHURI-ORSENDO TO JUDGE

I sure don't, sir. (indiscernible) incarcerated (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

But it's your, really your fault.

MR. CARACHURI-ORSENDO TO JUDGE

Yes, sir, it is.

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JUDGE TO MR. CARACHURI-ORSENDO

And somebody gave you the alprazolam or the pain killer pill as well?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

So, you're, you're convicted of the pain killer problem in 2003.

MR. CARACHURI-ORSENDO TO JUDGE

I believe so.

JUDGE TO MR. CARACHURI-ORSENDO

What was your punishment?

MR. CARACHURI-ORSENDO TO JUDGE

I believe I was incarcerated for (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Um-hum. Was that your first time in jail?

MR. CARACHURI-ORSENDO TO JUDGE

No, that was, that was (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

The marijuana conviction's a year later.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

So, the pain killer pill punishment, according to the Notice to Appear, was in 2003, or the conviction was 2003. The

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marijuana was in -- well, heck. Let's go back again. It looks like we have a problem here with the Notice to Appear. So, let's just go to the conviction records. All right. So, we have a conviction for possession of marijuana and the conviction was October 28, 2004. You got 20 days in jail. Is that right?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) confinement.

JUDGE TO MR. CARACHURI-ORSENDO

That may be a different conviction.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) possession of marijuana, possession of a controlled substance.

JUDGE TO MR. CARACHURI-ORSENDO

That was on November 15, 2005.

MR. CARACHURI-ORSENDO TO JUDGE

Right.

JUDGE TO MR. CARACHURI-ORSENDO

So, that's two convictions.

MR. CARACHURI-ORSENDO TO JUDGE

I was (indiscernible) I was sentenced to ten days confinement, sir.

JUDGE TO MR. CARACHURI-ORSENDO

All right. So, we have two convictions relating to a controlled substance. It looks like the same cause number. Ten days. So, you're right. The marijuana was first and then the

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pain killer. Well, the question I really wanted to ask was after going to jail one time, why would you go out and do something again that would send you to jail another time?

MR. CARACHURI-ORSENDO TO JUDGE

Well, like I said, sir, as far as the pill, I did not know if that was against the law to have the pill that's not on your prescription.

JUDGE TO MR. CARACHURI-ORSENDO

So, --

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) pain reliever.

JUDGE TO MR. CARACHURI-ORSENDO

You're living in the same apartment complex as that gave you the pill?

MR. CARACHURI-ORSENDO TO JUDGE

No. At that time, I had moved.

JUDGE TO MR. CARACHURI-ORSENDO

All right. So, he gave you the pill and then you walked out of his apartment with it?

MR. CARACHURI-ORSENDO TO JUDGE

Yeah.

JUDGE TO MR. CARACHURI-ORSENDO

And why did the police stop you?

MR. CARACHURI-ORSENDO TO JUDGE

It actually was the security guard for the apartment

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complex.

JUDGE TO MR. CARACHURI-ORSENDO

So, what happened?

MR. CARACHURI-ORSENDO TO JUDGE

They stopped me and they, they started asking for my ID and I didn't have no ID at the time and they started searching me and they found that pill on me and they decided to call the cops.

JUDGE TO MR. CARACHURI-ORSENDO

Did, did you consent to them searching you?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

You know, your story does not have a ring of truth to it. I've seen this 20,000 times in the last two years.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) that's what actually happened.

JUDGE TO MR. CARACHURI-ORSENDO

Well, the security guard has no reason to search you unless you're trying to enter the property illegally. If you're trying to enter legally and you don't have ID card, they don't search you, they turn you away. That's a common experience in life.

MR. CARACHURI-ORSENDO TO JUDGE

Well, sir, (indiscernible) whether they have the right or not.

JUDGE TO MR. CARACHURI-ORSENDO

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Well, you --no, I think you're doing something else for them to be able to search you.

MR. CARACHURI-ORSENDO TO JUDGE

Well, no, sir. (indiscernible) would have had something else --

JUDGE TO MR. CARACHURI-ORSENDO

No. You were doing something else.

MR. CARACHURI-ORSENDO TO JUDGE

No. I was not. I said I was on my way home (indiscernible) apartment.

JUDGE TO MR. CARACHURI-ORSENDO

Let's see here. Is there is a report, information that goes with this pill problem? Let's see. Security guard was a uniformed Houston police officer?

MR. CARACHURI-ORSENDO TO JUDGE

No. He had a uniform but it wasn't (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

So, he -- was he wearing a weapon?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

And so he found the pill on you?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

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And what did he do next?

MR. CARACHURI-ORSENDO TO JUDGE

Like I said, he called the cops.

JUDGE TO MR. CARACHURI-ORSENDO

And where were you while he was calling the cops?

MR. CARACHURI-ORSENDO TO JUDGE

Well, by that time, he had walked me to my apartment. So, he just made me wait right there in front of my apartment for the cops to show up.

JUDGE TO MR. CARACHURI-ORSENDO

Oh, I see. Were there any witnesses?

MR. CARACHURI-ORSENDO TO JUDGE

Yeah, there were but I couldn't get a hold of them right now.

JUDGE TO MR. CARACHURI-ORSENDO

So, there were people who saw the security guard frisk you down and take the pill from your person?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

Who were these witnesses?

MR. CARACHURI-ORSENDO TO JUDGE

It was friends of mine.

JUDGE TO MR. CARACHURI-ORSENDO

Friends of your's. Did he search them also?

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MR. CARACHURI-ORSENDO TO JUDGE

No. He just searched me.

JUDGE TO MR. CARACHURI-ORSENDO

Did they come into the apartment?

MR. CARACHURI-ORSENDO TO JUDGE

No.

JUDGE TO MR. CARACHURI-ORSENDO

Did they try to enter the apartment with you?

MR. CARACHURI-ORSENDO TO JUDGE

No.

JUDGE TO MR. CARACHURI-ORSENDO

Oh, they just walked you to the gate because you couldn't walk yourself to the gate?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

So, where were these friends? Where did they come from?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) around in the same complex.

JUDGE TO MR. CARACHURI-ORSENDO

They were already in the complex?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

Very well.

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JUDGE TO MR. EVANS

Mr. Evans, questions for respondent?

MR. EVANS TO JUDGE

Thank you, Judge.

MR. EVANS TO MR. CARACHURI-ORSENDO

How did you get busted for the marijuana?

MR. CARACHURI-ORSENDO TO MR. EVANS

Like I said, it was given to me and the manager for the apartment had seen me talking to one of the guys at the apartments and they said (indiscernible) allowed on the property. So, he went ahead and called the cops and when the cops came they decided (indiscernible) and the cop searched me and I had a cigar of marijuana in my possession.

MR. EVANS TO MR. CARACHURI-ORSENDO

So, you smoke marijuana fairly regularly, do you?

MR. CARACHURI-ORSENDO TO MR. EVANS

No, sir. It was something that I was trying I guess. Like I said, you know, it was the wrong decision to make.

MR. EVANS TO MR. CARACHURI-ORSENDO

That was the first time you'd ever smoked marijuana?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes, sir.

MR. EVANS TO MR. CARACHURI-ORSENDO

You look like you're a pretty regular smoker of marijuana.

MR. CARACHURI-ORSENDO TO MR. EVANS

That's your opinion, sir.

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MR. EVANS TO MR. CARACHURI-ORSENDO

Yeah, it sure is and I think you're lying to me. What else do you do? What gang do you belong to?

MR. CARACHURI-ORSENDO TO MR. EVANS

What makes you think that I would be in a gang?

MR. EVANS TO MR. CARACHURI-ORSENDO

Well, look at you. Why don't you get a mirror and look at yourself?

MR. CARACHURI-ORSENDO TO MR. EVANS

I look at myself all --

JUDGE TO MR. CARACHURI-ORSENDO

Sir, are you a member of a gang?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

Don't ask him questions. Just answer the

questions. Okay?

MR. EVANS TO MR. CARACHURI-ORSENDO

You want to smart off to me. Are you mad at me? You already mad at me? You blowing up mad at me, aren't you?

MR. CARACHURI-ORSENDO TO MR. EVANS

I don't have no reason to be mad at you.

MR. EVANS TO MR. CARACHURI-ORSENDO

You're getting that way, aren't you?

MR. CARACHURI-ORSENDO TO MR. EVANS

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No, sir.

MR. EVANS TO MR. CARACHURI-ORSENDO

Yeah. What's your conviction for -- or what's your arrest for evading arrest for? Why were you running?

MR. CARACHURI-ORSENDO TO MR. EVANS

I never ran, sir. (indiscernible) inside my apartment.

JUDGE TO MR, CARACHURI-ORSENDO

Do you have an arrest for evading arrest?

MR. CARACHURI-ORSENDO TO JUDGE

That's, that's what they took me to jail for

when I got locked up but I was never running.

JUDGE TO MR. CARACHURI-ORSENDO

Were you convicted of evading arrest?

MR. CARACHURI-ORSENDO TO JUDGE

No.

JUDGE TO MR. CARACHURI-ORSENDO

Okay.

JUDGE TO MR. EVANS

Mr. Evans?

MR. EVANS TO MR. CARACHURI-ORSENDO

What happened to the case?

MR. CARACHURI-ORSENDO TO MR. EVANS

Excuse me?

MR. EVANS TO MR. CARACHURI-ORSENDO

What happened to the case? Did it get dismissed or, or

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what?

MR. CARACHURI-ORSENDO TO MR. EVANS

Well, they gave me 14, 15 days in jail.

MR. EVANS TO MR. CARACHURI-ORSENDO

Okay. That was August of 2006?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes.

MR. EVANS TO MR. CARACHURI-ORSENDO

And so that's how you came into Immigration custody?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes, sir.

MR. EVANS TO MR. CARACHURI-ORSENDO

Okay. And the conviction you have for assault, that was on Latonya Jones (phonetic sp.), is that right?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yeah. That would be for domestic violence.

MR. EVANS TO MR. CARACHURI-ORSENDO

Domestic violence and, and that is your fiance?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes.

MR. EVANS TO MR. CARACHURI-ORSENDO

Okay. And she's not here today?

MR. CARACHURI-ORSENDO TO MR. EVANS

No, sir.

MR. EVANS TO MR. CARACHURI-ORSENDO

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Is she a United States citizen?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes she is.

MR. EVANS TO MR. CARACHURI-ORSENDO

And are you kids U.S. citizens?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes they are.

MR. EVANS TO MR. CARACHURI-ORSENDO

Okay. Let me make sure I have the convictions right. So, you have the evading arrest in August, right?

MR. CARACHURI-ORSENDO TO MR. EVANS

(indiscernible).

MR. EVANS TO MR. CARACHURI-ORSENDO

And then a possession controlled substance in 2005?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes.

MR. EVANS TO MR. CARACHURI-ORSENDO

Possession of marijuana 2004?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes.

MR. EVANS TO MR. CARACHURI-ORSENDO

Assault in 2003?

MR. CARACHURI-ORSENDO TO MR. EVANS

That would be the same thing as (indiscernible) family member.

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MR. EVANS TO MR. CARACHURI-ORSENDO

Yeah. Yeah. The domestic violence case. That's what I'm talking about. Yeah. And then a DWLS, driving while license suspended in 2000?

MR. CARACHURI-ORSENDO TO MR. EVANS

(indiscernible).

MR. EVANS TO MR. CARACHURI-ORSENDO

And then driving while license invalid, is that another case in 2005 in Chambers County?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes, sir.

MR. EVANS TO MR. CARACHURI-ORSENDO

Okay. And is that all of your arrests or do you have others?

MR. CARACHURI-ORSENDO TO MR. EVANS

Like I said, I wasn't, I was arrested before (indiscernible).

MR. EVANS TO MR. CARACHURI-ORSENDO

Okay. Okay. My records indicate that you actually became a lawful permanent resident in 1993. Is that, does that sound correct? Now, you may have come here in 1983 but you became a lawful permanent resident in '93, is that right?

JUDGE TO MR. EVANS

Well, the I-213 says '83, immigrant, and the Notice to Appear says '83.

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MR. EVANS TO JUDGE

Judge, those are wrong. It's 1993.

JUDGE TO MR. EVANS

Well, it's the only evidence I have. 1983.

MR. EVANS TO JUDGE

You should have a copy of the visa.

JUDGE TO MR. EVANS

The visa?

MR. CARACHURI-ORSENDO TO MR. EVANS

(indiscernible).

MR. EVANS TO JUDGE

In the long run, I don't think there's any effect at all, Judge. It's just, it's just --

JUDGE TO MR. EVANS

That's right. We have the visa showing March 18, 1993. Okay.

MR. EVANS TO JUDGE

And I guess I would ask that we amend the Notice to Appear for 1993, Judge.

JUDGE FOR THE RECORD

So done.

MR. EVANS TO JUDGE

Thank you, Judge.

MR. EVANS TO MR. CARACHURI-ORSENDO

Who's here, if you know, today on your behalf?

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MR. CARACHURI-ORSENDO TO MR. EVANS

I believe it would be my mother and my sister.

MR. EVANS TO MR. CARACHURI-ORSENDO

Okay. And they both live in Houston, right?

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes.

MR. EVANS TO MR. CARACHURI-ORSENDO

But LaTonya, she didn't come today?

MR. CARACHURI-ORSENDO TO MR. EVANS

No. She didn't show up.

MR. EVANS TO MR. CARACHURI-ORSENDO

Where did you go to high, where did you go to school, high school?

MR. CARACHURI-ORSENDO TO MR. EVANS

High school, I went to (indiscernible).

MR. EVANS TO MR. CARACHURI-ORSENDO

But you didn't graduate, right?

MR. CARACHURI-ORSENDO TO MR. EVANS

(indiscernible).

MR. EVANS TO MR. CARACHURI-ORSENDO

And you laid carpet then --

MR. CARACHURI-ORSENDO TO MR. EVANS

Yes.

MR. EVANS TO MR. CARACHURI-ORSENDO

-- since that time? And you're sure you're not in a gang?

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MR. CARACHURI-ORSENDO TO MR. EVANS

No, sir. (indiscernible) that would be the last thing on my mind to do.

MR. EVANS TO MR. CARACHURI-ORSENDO

All right.

MR. EVANS TO JUDGE

I don't have any other questions, Judge.

JUDGE TO MR. CARACHURI-ORSENDO

Do you have a difficult time finding employment?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir.

JUDGE TO MR. CARACHURI-ORSENDO

And how much do you get paid when you work installing carpets?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) I was making $10 an hour (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Um-hum. And did your fiance work?

MR. CARACHURI-ORSENDO TO JUDGE

Yes.

JUDGE TO MR. CARACHURI-ORSENDO

What kind of work does she do?

MR. CARACHURI-ORSENDO TO JUDGE

Well, she just started working (indiscernible) she was going to school.

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JUDGE TO MR. CARACHURI-ORSENDO

And so you don't have a difficult doing employment; the pay is not bad for someone who hadn't finished high school. So, you would think that you would do better with your life, sir. You would hope that you would do better with your life.

MR. CARACHURI-ORSENDO TO JUDGE

Well, sir, like I said, people make mistakes and (indiscernible) mine (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

You learned from your's?

MR. CARACHURI-ORSENDO TO JUDGE

When did you, when did the light come on for you?

JUDGE TO MR. CARACHURI-ORSENDO

Because this is, you've been dancing with the law for a long time.

MR. CARACHURI-ORSENDO TO JUDGE

Like I say, you know, people make mistakes and I've made mine.

JUDGE TO MR. CARACHURI-ORSENDO

No. You didn't, you didn't make a mistake. You committed crimes. Don't look at these as mistakes. These were not mistakes in judgements. These were crimes. You know that using marijuana is illegally. You know assaulting, having domestic violence which is a mild way of saying assaulting is illegal. You know driving with a license suspended is illegal. You know

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driving with invalid license is illegal. Evading arrest? What was that about?

MR. CARACHURI-ORSENDO TO JUDGE

Sir, like I said, when that happened, the cops answered a call for (indiscernible) and when, when (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Yeah. You should call them police. Show a

little bit more respect for them, too.

MR. CARACHURI-ORSENDO TO JUDGE

Like I said, I was never running from the cops. (indiscernible) --

JUDGE TO MR. CARACHURI-ORSENDO

You should call them police, policemen or policewomen.

MR. CARACHURI-ORSENDO TO JUDGE

You know, I was never running from them (indiscernible) never seen policemen at my apartment until they started rushing into my apartment.

JUDGE TO MR. CARACHURI-ORSENDO

So, you were in the apartment?

MR. CARACHURI-ORSENDO TO JUDGE

Yes. I never ran away from them.

JUDGE TO MR. CARACHURI-ORSENDO

And they arrested you in the apartment?

MR. CARACHURI-ORSENDO TO JUDGE

Inside my apartment, yes, sir.

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JUDGE TO MR. CARACHURI-ORSENDO

Were you outside the apartment before they

came into your apartment?

MR. CARACHURI-ORSENDO TO JUDGE

No I was not. (indiscernible). I was on my way to (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

You know, again, this just doesn't ring true, sir. If, if they were interested in you because of loud music, they would not charge you with evading arrest unless you resisted when you were inside the apartment. Did you resist their arrest?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) give me a chance to explain what happened.

JUDGE TO MR. CARACHURI-ORSENDO

Well, you're making it sound like the policemen were at fault and, no, I don't want to hear any more about how other people are at fault. I don't want to hear about any more mistakes you made. You committed crimes. You're right. I did cut you off because I want you to understand it. You're responsible for what you do.

MR. CARACHURI-ORSENDO TO JUDGE

And I never denied that I (indiscernible) but like I said, once again, I never run away from the cops.

JUDGE TO MR. CARACHURI-ORSENDO

Yeah and I'd like you to call them policemen.

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MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible), sir. I'm sorry.

JUDGE TO MR. CARACHURI-ORSENDO

Because I think there's a disrespect from you when you use the word "cops".

MR. CARACHURI-ORSENDO TO JUDGE

I apologize (indiscernible). That's not my intention.

JUDGE TO MR. CARACHURI-ORSENDO

All right. Well, then why'd they charge you with evading arrest? I'm listening.

MR. CARACHURI-ORSENDO TO JUDGE

Well, like I say what happened, they answered to, to a music disturbance call (indiscernible) came outside to (indiscernible) one of my friends that were staying with me at the time, (indiscernible). So, I decided to open the door and see if he was outside (indiscernible) my friends had said the cops had taken him outside. So, I opened the door to look outside and since I didn't see nobody, (indiscernible) his name about two or three times. I didn't get no answer. I didn't see no cop. I went back inside my apartment and close the door and, as I was closing the door, the cops started rushing inside my apartment.

JUDGE TO MR. CARACHURI-ORSENDO

Why you call them cops?

MR. CARACHURI-ORSENDO TO JUDGE

Sorry. Policemen.

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JUDGE TO MR. CARACHURI-ORSENDO

Well, why you call them cops?

MR. CARACHURI-ORSENDO TO JUDGE

I guess it's just something that I've been used to calling them. (indiscernible). It's just something that I've been used to.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. So, you yelled his name three times. You didn't see him. What did you do next?

MR. CARACHURI-ORSENDO TO JUDGE

I came back inside to my apartment, trying to see over the balcony, to see if by any chance he was outside near the parking (indiscernible) and that's when the policemen came inside my apartment and arrested me.

JUDGE TO MR. CARACHURI-ORSENDO

Was that your apartment or your mother's apartment?

MR. CARACHURI-ORSENDO TO JUDGE

I was staying with some friends at the time.

JUDGE TO MR. CARACHURI-ORSENDO

Oh, okay. So, --

JUDGE FOR THE RECORD

Let's change tape.

(OFF THE RECORD)

(ON THE RECORD)

(TAPE 2)

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JUDGE FOR THE RECORD

Tape number 2, file (Alien Registration Number). Today is November 27, 2006.

JUDGE TO MR. CARACHURI-ORSENDO

So, I thought you had lived last with your mother?

MR. CARACHURI-ORSENDO TO JUDGE

Yes I was but (indiscernible) friend's house.

JUDGE TO MR. CARACHURI-ORSENDO

I thought, I thought you were living with your fiance?

MR. CARACHURI-ORSENDO TO JUDGE

And my fiance and I lived with my mother (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

But you leave your fiance at your mother's house and you go live at your friend's house, apartment?

MR. CARACHURI-ORSENDO TO JUDGE

We was having problems, sir, and she was, I decided to go stay with my friends.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. So, you -- and you think you spent about 55 days in jail -- no, I'm sorry, about five months in jail off and on with all your arrests?

MR. CARACHURI-ORSENDO TO JUDGE

In total, yes. It might be (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

And let's see, you cost the tax payers lots of money every

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time you were arrested to go to Court, to go to prison. Why should you be allowed to stay in the United States, sir, when don't see anything positive that you've done for yourself or for the country, your community?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible), like I say, I do apologize for my mistakes. (indiscernible) my entire life and I do have children here to take care of and I understand that I've done wrong but my intentions are to correct my life because I've been trying. You know, I do have children to worry about.

JUDGE TO MR. CARACHURI-ORSENDO

What have you done to try and correct your life?

MR. CARACHURI-ORSENDO TO JUDGE

I've tried to stay out of trouble.

JUDGE TO MR. CARACHURI-ORSENDO

It looks like you've got in trouble every year for the last five years.

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) intention (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

Okay.

JUDGE TO MR. EVANS

Mr. Evans, was there a records check completed?

MR. EVANS TO JUDGE

Yes, it's been done, Judge.

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JUDGE TO MR. EVANS

And, other than the convictions that, the rest we've discussed, anything else?

MR. EVANS TO JUDGE

Nothing. Nothing else. Nothing else, Judge.

JUDGE TO MR. EVANS

All right.

JUDGE TO MR. CARACHURI-ORSENDO

I'm going to need to see the fingerprint letter your mother received. So, let's have whoever's out there on behalf of respondent come in the courtroom.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Back on the record. The respondent has not complied with the biometric instructions in that he has not sent in the $70 required for the fingerprinting fee and, until he does so, the Court is unable to grant or to, yeah, to grant his application for relief.

JUDGE TO MR. CARACHURI-ORSENDO

So, sir, you'll have to come up with $70 and send this all back to the Service Center with the $70 money order then they will send your mother a receipt showing that they received it. That's part of

the biometric instructions that you must comply with. So, I'm going to return these document to your mother.

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MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible) the application (indiscernible), could she do that for me?

JUDGE TO MR. CARACHURI-ORSENDO

Of course, your mother, anybody can send it for you. It doesn't make any difference. They just want $70.

MR. CARACHURI-ORSENDO TO JUDGE

Okay.

JUDGE TO MR. CARACHURI-ORSENDO

Okay? And when she buys a money order, she can put your name on it as if it's corning from you.

MR. CARACHURI-ORSENDO TO JUDGE

All right. (indiscernible) come back (indiscernible).

JUDGE TO MR. CARACHURI-ORSENDO

To whatever address, yeah, it looks like it's using her address and then she needs to get it to the Court. All right.

JUDGE TO RESPONDENT'S MOTHER

Ma'am, you'll need to send in a $70 money order to the address where you sent the application.

RESPONDENT'S MOTHER TO JUDGE

Okay.

JUDGE TO RESPONDENT'S MOTHER

You understand?

RESPONDENT'S MOTHER TO JUDGE

Yes, sir.

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JUDGE TO RESPONDENT'S MOTHER

And then they will send you a receipt back to your address. You need to bring that to the Court as soon as possible.

JUDGE FOR THE RECORD

Okay. So, in the meantime, I'll have to reset the matter for two weeks to give her an opportunity to do that and see if he gets a response back by then.

JUDGE TO MR. CARACHURI-ORSENDO

You have any questions, sir?

MR. CARACHURI-ORSENDO TO JUDGE

(indiscernible). Can I just tell her exactly what you said?

JUDGE TO MR. CARACHURI-ORSENDO

Well, I can do it in Spanish.

JUDGE TO RESPONDENT'S MOTHER

Ma'am, you need to sent a $70 money order to the address where you previously sent the application. Send the application back with that $70 money order then, in about two weeks, you should receive a receipt showing that they received your $70 and you should bring that to the Court, file it at the window as soon as possible.

RESPONDENT'S MOTHER TO JUDGE

Okay.

JUDGE TO RESPONDENT'S MOTHER

All right.

RESPONDENT'S MOTHER TO JUDGE

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And the fingerprints that they're asking of him (indiscernible)?

JUDGE TO RESPONDENT'S MOTHER

Don't worry about that. Just, just -- they just want your money.

RESPONDENT'S MOTHER TO JUDGE

Okay.

JUDGE FOR THE RECORD

In the meantime, we'll reset the matter for two weeks and hope that everything will be taken care of by then.

JUDGE TO MR. CARACHURI-ORSENDO

Sir, we'll have you come back to Court on December 12 at 9 o'clock.

JUDGE FOR THE RECORD

Matter's continued as indicated.

HEARING CONTINUED

APPENDIX K

TRANSCRIPT OF IMMIGRATION HEARING DECEMBER 12, 2006

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JUDGE FOR THE RECORD

This is Immigration Judge Jimmie Benton sitting in Houston, Texas. Today is December 12, 2006. This is a continuation of removal proceedings for respondent Jose Angel Carachuri-Orsendo, file (Alien Registration Number). The respondent's present. He's not represented by counsel. The Government's represented by Mr. James Manning. The interpreter in the Spanish language, previously sworn, Mr. Juan Herrerra, an employee of the Court.

JUDGE TO MR. CARACHURI-ORSENDO

Sir, what is your name?

MR. CARACHURI-ORSENDO TO JUDGE

Jose Angel Carachuri-Orsendo.

JUDGE TO MR. CARACHURI-ORSENDO

All right, sir. Last week, the U.S. Supreme Court has ruled that the definition of aggravated felony that had been used in Courts in the Fifth Circuit was incorrect. They held that for a crime to be an aggravated felony for controlled substances violations, the crime had to be punishable under

Federal law as a felony or, yeah, that's it. The crime had to be punishable under Federal law as a felony. Whether or not your convictions were punishable under Federal law as a felony I don't know because I haven't looked at the Federal law to compare what you're convicted with and a number of convictions will have happened if the same facts were viewed in a Federal Court for sentencing purposes. In any event, I'll have to have time to review your

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case, compare it to the law, and then I'll make a decision. I can do that in writing and, so you won't be corning back to Court most likely. But, before I recess the Court proceedings for today, in the event that your application for cancellation is denied, is there any -- I want to determine whether there's any other way you can avoid deportation from the United States. Is there any reason why you cannot return to Mexico?

MR. CARACHURI-ORSENDO TO JUDGE

No, sir. I have my children here (indiscernible). (indiscernible) fiance (indiscernible) four kids.

JUDGE TO MR. CARACHURI-ORSENDO

Do you fear for your life or freedom if you are returned to Mexico?

MR. CARACHURI-ORSENDO TO JUDGE

Well, basically, I haven't been there ever since

I've been here, you know, that was 5 years old or so. I have no family over there. All of my family is here. I know no other place other than here.

JUDGE TO MR. CARACHURI-ORSENDO

Okay. All right, sir. I've got all the information we need and I will issue a written decision in your case.

MR. CARACHURI-ORSENDO TO JUDGE

Also, (indiscernible) question if I may?

JUDGE TO MR. CARACHURI-ORSENDO

Yes, sir?

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MR. CARACHURI-ORSENDO TO JUDGE

You finally just told me that my case is (indiscernible) I guess (indiscernible) felony in Federal law --

JUDGE TO MR. CARACHURI-ORSENDO

The question I must determine is whether your convictions would qualify as felonies under Federal law. You were convicted in, in State Court.

MR. CARACHURI-ORSENDO TO JUDGE

Even though under Texas law (indiscernible) is

misdemeanors?

JUDGE TO MR. CARACHURI-ORSENDO

That's exactly right. We don't look at the State law anymore. We look at what would have happened in Federal Court.

MR. CARACHURI-ORSENDO TO JUDGE

So, it really won't make a difference if I have served my time (indiscernible) convictions?

JUDGE TO MR. CARACHURI-ORSENDO

No, sir. It won't. There's nothing you can say that's going to cause me to look at it differently. I told you the issue. I'm going to look at your conviction to see if they had occurred under Federal law you would have been sentenced to confinement for more than a year and the problem is with the second conviction. The first conviction I'm pretty sure you would not have been sentenced to confinement for more than a year. The second conviction I believe you would have been because Federal law punishes the second conviction more harshly

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than the first conviction.

MR. CARACHURI-ORSENDO TO JUDGE

But you did say that (indiscernible) fact that, you know, I was charged with (indiscernible) law of

(indiscernible)?

JUDGE TO MR. CARACHURI-ORSENDO

No, I didn't say that at all. I said it won't make any difference. I said it can go back, it can relate back, the law, and if, the law's effect on you.

MR. CARACHURI-ORSENDO TO JUDGE

So, are you saying that I won't have (indiscernible)?

JUDGE TO MR. CARACHURI-ORSENDO

No, sir. I'm going to -- whatever I determine I'm going to do it in writing and I'll give you a written decision.

MR. CARACHURI-ORSENDO TO JUDGE

And how long (indiscernible)?

JUDGE TO MR. CARACHURI-ORSENDO

I'm going to issue it December 21st or sooner.

MR. CARACHURI-ORSENDO TO JUDGE

December 21st. So, by then I should have an answer?

JUDGE TO MR. CARACHURI-ORSENDO

Yes, sir. I'm going to try my best to get you an answer by December 21st. Okay.

JUDGE FOR THE RECORD

Matter's continued for reserved decision.

HEARING CLOSED

PETITIONER'S BRIEF

(T)

No. 09-60

Supreme Court, U.S.
JAN 28 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The question presented is:

Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

PARTIES TO THE PROCEEDING

Petitioner is Jose Angel Carachuri-Rosendo, petitioner below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

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IN THE

Supreme Court of the United States

No. 09-60

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 570 F.3d 263 and reprinted at Pet. App. 1-10. The decision of the Board of Immigration Appeals, which heard the matter en banc, is reported at 24 I. & N. Dec. 382 and reprinted at Pet. App. 11-69. The decision of the Immigration Judge is unreported and reprinted at Pet. App. 70-75.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2009. Pet. App. 1. The petition for a writ of certiorari was filed on July 15, 2009, and granted on December 14, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant statutes are reproduced in the appendix to this brief. App., *infra*, 1-10.

STATEMENT OF THE CASE

A. Statutory Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq., establishes the framework under which non-citizens may enter and remain in the United States, and also sets forth the conditions under which non-citizens may be removed from the country. As to the latter, an alien who has been convicted of a violation of any state or federal law "relating to a controlled substance" (except for a single offense involving possession of a small quantity of marijuana) may be removed from the United States. 8 U.S.C. § 1227(a)(2)(B)(i). Notwithstanding such a conviction, certain lawful permanent resident aliens may apply to the Attorney General for discretionary cancellation of removal. *Id.* § 1229b(a). Such persons, however, are categorically ineligible for discretionary cancellation of removal if they have been "convicted of any aggravated felony." *Id.* § 1229b(a)(3).[1]

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[1] An alien convicted of an aggravated felony is subject to a number of other adverse consequences. For example, a conviction for an aggravated felony renders an alien ineligible for asylum, *id.* §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i), presumptively barred from withholding of removal, *id.* § 1231(b)(3)(B)(ii), and ineligible for voluntary departure, *id.* § 1229c(a)(1). An aggravated-felony conviction also serves as a permanent bar to reentering the country, *id.* § 1182(a)(9)(A)(i)-(ii), and increases the maximum sentence for illegal reentry by a factor of ten. *Compare id.* § 1326(a) (setting statutory maximum penalty at two years for an illegal reentrant), *with id.* § 1326(b) (setting

The INA sets forth a list of offenses that constitute aggravated felonies. *See* 8 U.S.C. § 1101(a)(43). Of particular salience, the INA defines "aggravated felony" to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18)." *Id.* § 1101(a)(43)(B). Section 924(c) in turn defines the term "drug trafficking crime" as, *inter alia*, "any *felony* punishable under the Controlled Substances Act [CSA]." 18 U.S.C. § 924(c)(2) (emphasis added). That definition applies regardless of whether the offense is "in violation of Federal or State law." 8 U.S.C. § 1101(a)(43)(B).

2. The CSA makes it a crime to "knowingly or intentionally . . . possess a controlled substance" without a prescription. 21 U.S.C. § 844(a). Simple possession of a controlled substance under Section 844(a) is ordinarily a misdemeanor punishable by "a term of imprisonment of not more than 1 year." *Id.*; *see* 18 U.S.C. § 3559(a)(6) (classifying an offense carrying a maximum term of imprisonment of "one year or less but more than six months[] as a Class A misdemeanor"). Because simple possession ordinarily constitutes a misdemeanor under the CSA, that offense, standing alone, fails to constitute an "aggravated felony" for purposes of the INA.

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statutory maximum penalty at twenty years for an illegal reentrant with an aggravated felony conviction). In addition, such a conviction dramatically increases the base offense level under the Sentencing Guidelines. *See* U.S.S.G. § 2L1.2 (providing for an 8-level increase in the base offense level for illegal reentry for an alien with a conviction for an aggravated felony).

Under the CSA, when a person possesses a controlled substance after a prior conviction for a drug offense under federal or state law has become final, the prosecutor has the option of seeking a recidivist enhancement. A recidivist enhancement, if established, would convert misdemeanor simple possession into a felony. 21 U.S.C. §§ 844, 851. The CSA prescribes, however, that no defendant may be made subject to a recidivist enhancement unless the prosecutor files an information with the court setting forth any previous convictions on which the government seeks to rely, and unless the defendant has an opportunity to challenge the government's reliance on the alleged prior convictions, including by challenging the validity of the prior convictions if they occurred within the preceding five years. *Id.* § 851.

If the prosecutor follows the required steps and the court concludes that the defendant is subject to the recidivist enhancement by reason of a prior drug conviction, the defendant may be sentenced "to a term of imprisonment for not less than 15 days but not more than 2 years." 21 U.S.C. § 844(a); *see also id.* § 851(d). A conviction for recidivist possession constitutes a felony under the CSA. *See* 18 U.S.C. § 3559(a)(5) (classifying an offense carrying a maximum term of imprisonment of "less than five years but more than one year[] as a Class E felony").

B. Factual Background

1. Petitioner was born in Mexico and immigrated to the United States with his parents. J.A. 52. He later became a lawful permanent resident, and has worked as a carpet installer from the time he was seventeen years old. *Id.* at 52, 79, 109. Petitioner is engaged to a U.S. citizen, with whom he has four

children, each also a U.S. citizen. *Id.* at 76-77; A.R. 527-35. In addition, petitioner's mother and two sisters live in the United States. J.A. 72-74. Petitioner has no family in Mexico, and before the government removed him from the country, petitioner had made no visits to Mexico since childhood. *Id.* at 89-90.

2. In October 2004, petitioner was arrested in Harris County, Texas, for possession of less than two ounces of marijuana, a Class B misdemeanor under Texas law. Tex. Health & Safety Code Ann. § 481.121(b)(1); *see also* J.A. 17. Petitioner waived his right to a jury trial and pleaded guilty to the offense. *Id.* at 19-20. The court sentenced petitioner to 20 days of confinement. *Id.* at 20.

In November 2005, petitioner pleaded *nolo contendere* to possession of a controlled substance without a prescription, a Class A misdemeanor under Texas law, based on his possession of one tablet of Xanax. Tex. Health & Safety Code Ann. §§ 481.104(a)(2), 481.117(b); *see also* Pet. App. 2; J.A. 86-87. Texas's recidivist laws punish second or subsequent offenses more harshly than first offenses if the prior offense is a class A misdemeanor or more serious offense. But because petitioner's prior conviction for possession of marijuana was only a Class B misdemeanor, it could not be used as the basis for a recidivist charge under Texas Law. *See* Tex. Penal Code § 12.43. While petitioner also had a prior conviction for Class A misdemeanor assault that could have served as the basis for a recidivist charge, the state prosecutor elected to forgo seeking a recidivist enhancement based on that conviction. J.A. 32 (handwritten note to "[a]bandon enhancement"). The state court sentenced petitioner to 10 days of confinement. *Id.*

C. Proceedings Below

1. On September 14, 2006, the federal government issued petitioner a Notice to Appear, charging that he was removable from the United States based on his misdemeanor drug conviction for possessing a controlled substance (Xanax) without a prescription. J.A. 52. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (authorizing removal based on any drug offense other than a single offense of possessing a small quantity of marijuana). The immigration judge (IJ) found that petitioner was subject to removal based on his conviction of a controlled substance violation, but advised petitioner that he was eligible to apply for discretionary cancellation of removal pursuant to 8 U.S.C. § 1229b(a). The IJ continued the hearing to enable petitioner to file an application for cancellation of removal. J.A. 60-61.

While petitioner's immigration proceedings were pending, this Court issued its decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006). *Lopez* considered the circumstances in which a state-law drug possession offense qualifies as a "drug-trafficking crime"—and hence an "aggravated felony"—under the INA. *Id.* at 50. *Lopez* addressed, in particular, whether a state drug possession offense "made a felony under state law but a misdemeanor under the Controlled Substances Act is a 'felony punishable under the Controlled Substances Act,'" and thus is a "drug-trafficking crime" for purposes of the INA's definition of "aggravated felony." *Id.* (quoting 18 U.S.C. § 924(c)). The Court found it irrelevant whether state law makes possession a felony, holding instead that the salient question is whether the state offense "proscribes conduct punishable as a felony under"

the CSA. *Id.* at 60. A contrary conclusion, the Court explained, "would often turn simple possession into trafficking" whenever a state deemed simple possession a felony rather than a misdemeanor. *Id.* at 54. That result, the Court concluded, would be inconsistent "with any commonsense conception of 'illicit trafficking.'" *Id.* at 53. Because Lopez's state law conviction for simple possession failed to constitute a felony under the CSA, the offense did not qualify as an "aggravated felony" under the INA. Lopez thus retained eligibility to seek cancellation of removal. *See id.* at 52.

On December 12, 2009—one week after this Court issued its decision in *Lopez*—the IJ held a final hearing to consider petitioner's application for cancellation of removal. On December 19, 2006, the IJ issued a written order finding petitioner removable because of his conviction for possession of Xanax. Pet. App. 72-75. The IJ denied petitioner's application for cancellation of removal without addressing its merits. The IJ concluded that petitioner's conviction for simple possession constituted conviction of an aggravated felony, thus rendering petitioner ineligible for cancellation. The IJ reasoned that petitioner's conviction for simple possession would have the "potential" to give rise to a felony sentence under the CSA if petitioner had been federally charged with, and convicted of, recidivist possession. *Id.* at 73.

2. Petitioner filed a timely appeal of the IJ's decision with the Board of Immigration Appeals (BIA). The BIA described the issue as "whether, under *Lopez v. Gonzales*, a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony, not-

withstanding that the second offense did not charge the alien as a recidivist or otherwise allow the alien to challenge the validity of the first conviction." A.R. 247 (citation omitted).

The BIA heard the case en banc, observing that the case presented an appropriate "vehicle for articulating [the BIA's] analytical approach to the 'recidivist possession' issue." Pet. App. 12, 22 n.5. The BIA explained that, under this Court's decision in *Lopez*, an alien convicted of a state offense could be considered "convicted" of an "aggravated felony" under the INA only if the offense conduct would have been punishable as a felony under federal law. *Id.* at 14-15. The BIA concluded that a state conviction for drug possession could be deemed punishable as a felony under federal law due to recidivism only if "the State offense corresponds in a meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism." *Id.* at 26.

The BIA thus determined that a state possession conviction fails to qualify as an aggravated felony based on recidivism "unless the State successfully sought to impose punishment for a recidivist drug conviction"—that is, unless the defendant's "status as a recidivist" was "admitted or determined by a court or jury within the prosecution for the second drug [possession] crime." Pet. App. 27-28. In so holding, the BIA observed that the Department of Homeland Security (DHS) had initially objected to that approach, but had "modified its position" after argument and "concede[d] that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to 'recidi-

vist possession' unless the State actually used those laws to prosecute the [defendant]." *Id.* at 26.

The BIA noted that the Fifth and Seventh Circuits had adopted a contrary view. Pet. App. 17-18, 28-29 (discussing *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), and *United States v. Pacheco-Diaz*, 506 F.3d 545, 548-49 (7th Cir. 2007)). While the BIA stated that the Fifth Circuit "may want to reexamine its law in the wake of *Lopez*," it concluded that it was compelled to defer to the court in resolving petitioner's case. *Id.* at 21. Accordingly, even though the BIA believed that petitioner "ha[d] not been convicted of an aggravated felony" and should be eligible for cancellation of removal, the BIA was "constrained" to affirm the IJ's decision. *Id.* at 28-29. "[I]n the absence of controlling circuit law," however, the BIA determined that its approach would govern the issue. *Id.* at 22.

3. The court of appeals affirmed. Pet. App. 1-10. The court concluded that its pre-*Lopez* decision in *Sanchez-Villalobos*, and its post-*Lopez* decision in *United States v. Cepeda-Rios*, 530 F.3d 333 (5th Cir. 2008), "control[led]" the case. *Id.* at 4. Under those decisions, conviction of a state drug possession offense constitutes conviction of an aggravated felony for purposes of the INA if the offense is an alien's "second possession offense" and it "therefore[] could have been punished as a felony under the CSA's recidivism provision"—even if no recidivism charge in fact was brought and no recidivism finding in fact was made. *Id.* at 4-5.

SUMMARY OF ARGUMENT

Under the INA, an alien who has "been convicted" of an aggravated felony is categorically ineligible to seek discretionary cancellation of removal. 8 U.S.C. § 1229b(a)(3). The issue in this case is whether petitioner was "convicted" of an aggravated felony by virtue of his conviction for possessing a controlled substance (Xanax) without a prescription. The answer is no. Simple possession of drugs is generally a misdemeanor, not a felony. While drug possession can rise to a felony when a defendant is convicted of recidivist possession based on a prior conviction, there was no charge or finding of recidivism when petitioner was convicted for possessing Xanax. Even if, as the Government contends, petitioner *could have been* convicted of recidivist possession had additional charges and findings been made, the statute prescribes mandatory removal only of persons who have "been convicted" of an aggravated felony, not of any person who "could have been convicted" of an aggravated felony.

A. An alien has been "convicted" of felony recidivist possession only if, unlike here, the convicting court made a finding of recidivism. The INA defines "aggravated felony" to include "illicit [drug] trafficking," and defines "illicit trafficking" to include "any felony punishable under the [CSA]." 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). As this Court explained in *Lopez*, a state law drug offense constitutes a "felony punishable under the [CSA]" if the state offense "proscribe[s] conduct punishable as a felony under [the CSA]." 549 U.S. at 60. The Court emphasized that, because the overarching category is "illicit trafficking," and because drug possession fails to constitute "trafficking" as a matter of ordi-

nary meaning, a possession offense could constitute the aggravated felony of illicit trafficking only in the event of a "clear statutory command" coercing that conclusion. *Id.* at 55 n.6.

Here, there is no such "clear statutory command" coercing the conclusion that petitioner's conviction for possessing Xanax constituted a conviction for felony recidivist possession. To the contrary, the INA defines a "conviction" to mean "a formal judgment of guilt . . . by a court." 8 U.S.C. § 1101(a)(48)(A). The state court formally judged petitioner guilty of simple possession of a controlled substance. The court made no determination—much less a "formal judgment"—that petitioner had a prior drug conviction when he committed the possession offense. Accordingly, petitioner was "convicted" only of simple possession, a federal law misdemeanor, not recidivist possession, a federal law felony.

That conclusion is underscored by examining what would have happened to petitioner in an analogous federal prosecution. If petitioner had been charged in federal court with simple possession of Xanax and had pleaded guilty to that charge, he would be eligible only for a misdemeanor sentence. Under the approach of the court of appeals below, however, an *IJ* could *later* determine that petitioner in fact had a prior drug possession conviction, and on that basis could transform petitioner's misdemeanor conviction into a felony for purposes of the INA on the theory that he *could have been* charged with recidivist possession. There is no merit to that approach. The INA directs attention to whether a person has "been convicted" of an aggravated felony, not whether he "could have been convicted" of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3).

The treatment of other felony possession offenses reinforces the point. Federal law separately criminalizes simple possession of drugs, a misdemeanor, and possession of drugs with intent to distribute them, a felony. Certain states, however, lack any separate offense of possession with intent to distribute, and instead tie the penalty for possession to the quantity of drugs possessed. This Court has explained that a person convicted of possession in such a state would be treated for INA purposes as having been convicted of misdemeanor simple possession, even if the quantity of drugs possessed was substantial. Just as an IJ could not subsequently find that an alien *could have been* prosecuted for possession with intent to distribute, an IJ cannot subsequently find here that an alien could have been prosecuted for recidivist possession.

The Government suggests that, because recidivism fails to constitute an offense element for constitutional purposes, recidivism need not have been found by the convicting court here and instead could be later found by an IJ. The question whether recidivism is an offense element for *constitutional* purposes, however, has no bearing on the *statutory* issue presented here. The INA's requirement that a person have been "convicted" of recidivist possession calls for a finding of recidivism by the convicting court, regardless of whether the fact of recidivism may be considered a non-element for constitutional purposes. In any event, even assuming, *arguendo*, that the INA treats as an aggravated felony only a drug offense whose elements render it a felony, simple possession would *never* qualify as an aggravated felony on that understanding because the elements alone constitute a misdemeanor.

B. While the absence of a finding of recidivism by the convicting court alone suffices to establish that petitioner was not convicted of an aggravated felony, his state offense fails to qualify for the additional reason that it lacked the essential features required for the conduct to be "punishable as a felony" under the CSA. *See Lopez*, 549 U.S. at 60. The CSA prescribes that a defendant may not be convicted of recidivist possession unless the prosecution files an information setting forth the prior convictions relied on by the government, and unless the defendant has an opportunity to challenge the prior convictions on which the prosecutor intends to rely. 21 U.S.C. § 851. In order for a state possession conviction to qualify as an aggravated felony on the basis that it is analogous to the CSA offense of recidivist possession, the state conviction must contain those essential features of the federal scheme.

The Government's effort to discount those features as "procedural" is unpersuasive and irrelevant. The requirement of a prosecutorial screen embodies a substantive judgment by Congress to refrain from treating every drug possessor with a prior conviction as a felon, and instead to rely on the experience and judgment of prosecutors to determine when felony treatment as a recidivist is warranted based on the individual's circumstances. Similarly, the requirement to afford the defendant an opportunity to challenge the validity of prior convictions relied on by the government constitutes a substantive determination by Congress that invalid convictions should play no role in assessing whether a defendant is a recidivist. At any rate, regardless of whether those features are characterized as "procedural" or "substantive," they are necessary components of any state law offense

deemed to be analogous to recidivist possession under the CSA because they are absolute preconditions to a federal conviction for recidivist possession.

C. The court of appeals' interpretation, by categorically denying eligibility for cancellation of removal to persons convicted of simple drug possession, unnecessarily visits harsh consequences on lawful permanent resident aliens who have extensive ties to the country. Conversely, preserving petitioner's ability to seek cancellation of removal would not disserve the government's legitimate interests in removing criminal aliens. It would grant petitioner no automatic entitlement to remain in the country, but instead would merely afford petitioner and similarly situated aliens an opportunity to apply for discretionary relief from removal. In considering whether to grant discretionary relief, the Attorney General would remain free to consider any prior convictions, whether or not found by the convicting court.

D. Finally, while the terms of the INA demonstrate that petitioner was not "convicted" of an aggravated felony, principles of lenity would dictate resolving any lingering ambiguities on the matter in petitioner's favor. Ambiguities in immigration statutes are resolved in favor of the alien, and ambiguities in criminal statutes—including, as here, statutes with criminal and non-criminal applications—are resolved in favor of the defendant. Both of those lenity principles apply here.

ARGUMENT

A PERSON CONVICTED OF SIMPLE POSSESSION OF DRUGS, WITH NO CHARGE OR FINDING OF RECIDIVISM IN THE CONVICTING COURT, HAS BEEN CONVICTED OF A MISDEMEANOR RATHER THAN AN AGGRAVATED FELONY

The INA bars the grant of discretionary cancellation of removal to any alien who has "been convicted of an[] aggravated felony," including "any felony punishable under the [CSA]." 8 U.S.C. § 1229b(a)(3); *id.* § 1101(a)(43)(B); 18 U.S.C. § 924(c). The statute's prescription of mandatory removal for an alien convicted of an aggravated felony applies not only to an alien convicted of a federal drug felony, but also to an alien convicted of a state drug offense corresponding to a federal felony. *See Lopez v. Gonzales*, 549 U.S. 47; 8 U.S.C. § 1101(a)(43)(B) ("[T]he term [aggravated felony] applies to an offense . . . whether in violation of Federal or State law[.]"). In particular, an alien convicted of a state drug offense is subject to mandatory removal if the state offense at issue "proscribes conduct punishable as a felony under" the CSA. *Lopez*, 549 U.S. at 60. Conversely, "[u]nless a state offense is punishable as a federal felony it does not count." *Id.* at 55.

The issue in this case thus is whether petitioner has "been convicted of an[] aggravated felony," 8 U.S.C. § 1229b(a)(3)—*i.e.*, of "conduct punishable as a felony under" the CSA, *Lopez*, 549 U.S. at 60. He has not. Petitioner was convicted under state law of simple possession of a controlled substance without a prescription, conduct punishable as a misdemeanor under federal law. 21 U.S.C. § 844(a); *see Lopez*, 549

U.S. at 53 ("Mere possession is not . . . a felony under the federal CSA."). There was no charge or finding in petitioner's state proceeding that he committed simple possession "after a prior conviction under" a federal or state drug law had "become final"—a finding that, had it been made, could have rendered petitioner convicted of recidivist possession, a federal law felony. 21 U.S.C. § 844(a). The court of appeals nonetheless held that petitioner's conviction for simple possession subjected him to mandatory removal because an *IJ subsequently* found that petitioner in fact had a prior drug conviction when he committed his simple possession offense, and that petitioner therefore *could have been* prosecuted for—and convicted of—the federal felony of recidivist possession.

That holding cannot be squared with the text of the INA. The statute prescribes the mandatory removal only of an alien who has "been convicted of an[] aggravated felony," 8 U.S.C. § 1229b(a)(3), not of any alien who "could have been convicted" of an aggravated felony had additional charges and findings been made. Because petitioner was prosecuted for, and found guilty of, simple possession, a federal law misdemeanor—not recidivist possession, a federal law felony—he retains eligibility to seek discretionary cancellation of removal.

A. A Person Has Been "Convicted" Of The Aggravated Felony Of Recidivist Possession Only If The Convicting Court Made A Finding Of Recidivism

1. A drug possession offense constitutes the aggravated felony of drug "trafficking" only if, unlike here, the statute compels that reading

Petitioner may seek cancellation of removal unless he has been "convicted of" an "aggravated felony." 8 U.S.C. § 1229b(a)(3). The INA defines an "aggravated felony" to include "illicit [drug] trafficking," and in turn defines "illicit trafficking" to include "any felony punishable under the [CSA]." *Id.* § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). As this Court emphasized in *Lopez*, because "the term ultimately being defined" is "illicit trafficking," the "everyday understanding of 'trafficking' should count for a lot" when assessing whether a person has been convicted of an "aggravated felony." 549 U.S. at 53.

This case concerns the circumstances in which a person may be deemed convicted of the felony of "recidivist possession." *Lopez*, 549 U.S. at 55 n.6. Drug possession offenses, including recidivist possession, fail to constitute drug "trafficking" as a matter of ordinary meaning. As the Court explained in *Lopez*, "ordinarily 'trafficking' means some sort of commercial dealing," and commerce "certainly . . . is no element of simple possession." *Id.* at 53-54. The Court observed in a footnote that "Congress did counterintuitively define some possession offenses as 'illicit trafficking'"—including "recidivist possession"—notwithstanding the anomaly of treating possession as "trafficking." *Id.* at 55 n.6. But the Court made clear that, to the extent the INA required concluding

that certain possession offenses qualify as "trafficking," the INA could be read to "override ordinary meaning" in that manner only in the event of a "clear statutory command" that "coerce[s]" the "inclusion" of a possession offense "in the definition of 'illicit trafficking.'" *Id.*

Here, there is no "clear statutory command" coercing the conclusion that petitioner's conviction for drug possession should be treated as a conviction for the aggravated felony of illicit trafficking on the basis that he could have been (but was not) found guilty of recidivism. To the contrary, as we explain next, the INA's textual requirement of a felony "conviction" establishes a "clear statutory command" compelling the opposite conclusion.

2. The INA's terms establish that a conviction for felony recidivist possession requires a finding of recidivism by the convicting court

a. Under the terms of the INA, a person is subject to mandatory deportation based on a drug offense if he has been "*convicted of*" conduct punishable as a felony under the CSA. 8 U.S.C. § 1229b(a)(3) (emphasis added); *see Lopez*, 549 U.S. at 60. The INA defines the pivotal term "conviction," in pertinent part, as "a formal judgment of guilt . . . by a court." 8 U.S.C. § 1101(a)(48)(A).[2]

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[2] When a formal judgment of guilt has been withheld—*i.e.*, when a court defers issuing a judgment of guilt pending a probationary period, *e.g.*, 18 U.S.C. § 3607—the INA provides an alternative definition of a conviction: "where . . . a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt," and "the judge has ordered some

The INA therefore prescribes a straightforward test for determining whether a person with a state law drug conviction has been "convicted" of "conduct punishable as a felony under [the CSA]." *Lopez*, 549 U.S. at 60. First, the IJ must identify the conduct as to which the convicting court rendered "a formal judgment of guilt." 8 U.S.C. § 1101(a)(48)(A). Then, the IJ must determine whether that conduct of conviction is punishable as a felony under the CSA.

With "few exceptions, the CSA punishes drug possession offenses as misdemeanors"—"that is, by one year's imprisonment or less"—rather than as felonies. *Lopez*, 549 U.S. at 54 n.4; *see also id.* at 53 ("[T]he CSA punishes possession, albeit as a misdemeanor."); 21 U.S.C. § 844(a). One such exception is for "recidivist possession," *Lopez*, 549 U.S. at 55 n.6, which arises under the CSA if the defendant commits drug possession "after a prior conviction . . . for any drug, narcotic, or chemical offense . . . has become final," in which event the defendant faces a felony sentence of up to two years of imprisonment. 21 U.S.C. § 844(a). Other exceptions in which the CSA punishes possession as a felony include possession of five or more grams of cocaine base, and possession of flunitrazepam (commonly known as a date-rape drug). *Id.*; *see Lopez*, 549 U.S. at 54 n.4.

b. In this case, the state court formally judged petitioner guilty of simple possession of a controlled substance. J.A. 31. The court made no determination—much less a "formal judgment," 8 U.S.C. § 1101(a)(48)(A)—that petitioner committed his pos-

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form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. § 1101(a)(48)(A)(1). That alternative definition has no bearing when, as here, the convicting court does not withhold or defer a formal judgment of guilt.

session offense "after a prior conviction under" a federal or state drug law had "become final." 21 U.S.C. § 844. Petitioner therefore was "convicted" of simple drug possession, a federal law misdemeanor. He was not convicted of recidivist possession, a federal law felony. Accordingly, while petitioner was subject to removal based on his conviction of a drug offense, 8 U.S.C. § 1227(a)(2)(B)(i), he retained eligibility to seek discretionary cancellation of removal, *id.* § 1229b(a)(3).

In reaching a contrary conclusion, the court of appeals failed to address the significance of the INA's requirement that petitioner must have "been convicted" of conduct punishable as a federal drug felony. 8 U.S.C. § 1229b(a)(3). Instead, as the BIA explained, the court of appeals allowed the IJ "to collect" two simple possession convictions, each punishable as a federal law misdemeanor, "bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that *could have been* prosecuted as a Federal felony." Pet. App. 30 (emphasis added).

The INA, as the BIA correctly concluded, does not countenance that result. The INA does not subject to mandatory removal a person who has been convicted of two or more misdemeanor drug offenses. Nor does the INA subject to mandatory removal a person whose conduct "could have been prosecuted as a Federal felony." Pet. App. 30. Instead, it subjects to mandatory removal a person who has been "convicted" of conduct punishable as a felony under the CSA. 8 U.S.C. § 1229b(a)(3); *see Lopez*, 549 U.S. at 60. That statutory standard requires, as a precondition to mandatory removal, a "formal judgment" by the state convicting court not only that pe-

titioner possessed a controlled substance, but also that he did so after he had been previously convicted of a drug offense. *See* 8 U.S.C. § 1101(a)(48)(A); 21 U.S.C. § 844(a). Because the state convicting court made no such finding of recidivism, petitioner was not convicted of an aggravated felony.

The courts of appeals that have focused on the INA's "conviction" requirement have recognized that a person is not subject to mandatory removal merely because an IJ finds that he could have been prosecuted for a drug felony. As one of those courts explained, the INA requires "an actual conviction for an offense that proscribes conduct that is punishable as a federal felony, not a conviction that *could* have been obtained *if* it had been prosecuted." *Alsol v. Mukasey*, 548 F.3d 207, 215 (2d Cir. 2008); *see also Rashid v. Mukasey*, 531 F.3d 438, 445 (6th Cir. 2008) (statutory question is "whether the crime that an individual was *actually convicted of* would be a felony under federal law," not "what federal crimes an individual could hypothetically have been charged with").

The contrary conclusion of the Fifth Circuit below cannot be squared with the INA's textual requirement of a conviction of an aggravated felony. The court below erroneously drew a fundamental distinction between (i) a person convicted of simple possession who has no prior drug conviction, and (ii) a person convicted of simple possession who has a prior drug offense that was never introduced, charged, or found in the proceedings before the convicting court. The court of appeals below would treat the former as convicted of a misdemeanor and the latter as convicted of an aggravated felony, even though, from the perspective of the statutory definition of "conviction,"

both persons would have a "formal judgment of guilt" of exactly the same conduct—*i.e.*, simple possession. 8 U.S.C. § 1101(a)(48)(A). Because both persons would have been "convicted" of the same conduct, there is no statutory basis for drawing a salient distinction between them.

c. An examination of what would have happened to petitioner in a corresponding federal law prosecution illuminates the fundamental flaws in the approach of the Fifth Circuit below. If petitioner had been prosecuted under 21 U.S.C. § 844(a) for simple possession of a controlled substance and had pleaded guilty to that offense, and if there had been no finding by the convicting court that petitioner had a prior drug conviction, he indisputably would stand convicted only of misdemeanor simple possession because any term of imprisonment could not exceed one year. *Id.* While petitioner would be ineligible for a sentence exceeding one year of imprisonment, the Fifth Circuit below nonetheless would deem him to have been "convicted" of a felony on the theory that he could have been charged with, and convicted of, recidivist possession. The court below would conclude, in short, that a person convicted of a federal misdemeanor was convicted of a federal felony because he could have been prosecuted for a federal felony, even though he was not. To state that proposition is to confirm its indefensibility.

Indeed, when this case was before the BIA, the DHS evidently changed its position on the question presented because it could not defend that result. Initially, the DHS took the position that a state conviction for simple possession constitutes an aggravated felony whenever an alien "has a criminal history that *could have* exposed him to felony treatment

had he been prosecuted federally." Pet. App. 26. But the DHS changed its position after oral argument before the BIA, evidently based on concerns that its initial position logically would result in "a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement." *Id.* at 27.

As the DHS apparently recognized, there is no basis under the INA for distinguishing between (i) a *federal* conviction for simple possession of a controlled substance where there has been no formal judgment of recidivism and (ii) a *state* conviction for simple possession where there has been no such formal judgment. Rather, the requirement of a "conviction" of a federal drug "felony" applies equally to both state and federal offenses. *See* 8 U.S.C. §§ 1229b(a), 1101(a)(43)(B) (incorporating 18 U.S.C. § 924(c)(2)). Indeed, Congress specifically amended the INA to make the definition of aggravated felony "appl[y] . . . whether in violation of Federal or State Law." *Id.* § 1101(a)(43). As this Court explained in *Lopez*, one purpose of that amendment was to ensure that state crimes "analogous" to a federal felony receive the same treatment under the INA. *See* 549 U.S. at 57 & n.8.

Consequently, insofar as a federal conviction for recidivist possession is an aggravated felony subjecting an alien to mandatory deportation, an "analogous" state conviction would have the same consequence. But because a federal conviction for simple possession with no judgment of recidivism by the convicting court fails to constitute a conviction for an aggravated felony, neither does a corresponding

state law conviction. In both events, an IJ's subsequent finding that the person could have been prosecuted for recidivist possession cannot transform a conviction for misdemeanor simple possession into a conviction for felony recidivist possession.[3]

3. Congress's treatment of drug possession in related provisions reinforces the need for a finding of recidivism by the convicting court

a. Recidivist possession should be treated in a manner consistent with other felony drug possession offenses under the CSA. A conviction for possession of drugs with intent to distribute them, for instance, constitutes a felony under the federal drug laws. 21 U.S.C. § 841. But if state law contains no corre-

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[3] Some of the confusion in this area may stem from the use of the phrase "hypothetical federal felony" to describe the approach adopted in *Lopez*. *Lopez* did not use that terminology. But before *Lopez*, the BIA and many lower courts did. That phrase is unhelpful here because it does not address the question whether an IJ must look solely to conduct found by the convicting court in deciding whether a person hypothetically could have been convicted of a federal felony, or whether an IJ may also consider facts *not* adjudicated by the convicting court. The answer to that question is supplied by the term "conviction," which limits the IJ to the conduct adjudicated by the convicting court. Thus, as one court has explained, the only permissible "hypothetical" is "whether the crime that an individual was actually convicted of would be a felony under federal law," and "looking to facts not at issue in the crime of conviction in order to determine whether an individual *could have been charged* with a federal felony" adds "an impermissible second hypothetical." *Rashid*, 531 F.3d at 445.

sponding offense of possession with intent to distribute and instead ties the penalty to the quantity of drugs possessed, a defendant with a state conviction for possessing drugs would be treated under the INA as having been convicted of misdemeanor simple possession rather than the aggravated felony of possession with intent to distribute.

That would be so even if the defendant were convicted under state law of possessing a massive quantity of drugs. An IJ could not later deem the defendant convicted of an aggravated felony on the theory that, because of the quantity of drugs involved, he could have been convicted under federal law of having an intent to distribute. This Court in *Lopez* made that precise point, explaining that "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount." 549 U.S. at 60.

As that example illustrates, the question whether a state conviction for drug possession is punishable as a federal drug felony depends on the offense conduct found by the convicting court, not on an IJ's subsequent, independent assessment of the conduct for which the defendant *could have been* (but was not) prosecuted and convicted. Because statutes are interpreted as a "symmetrical and coherent" whole, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), the felony of recidivist possession should be treated the same way, and should likewise turn on whether the convicting court made a finding of recidivism—not on a post hoc assessment of whether a court could have made that finding. *See Nijhawan v. Holder*, 129 S. Ct. 2294, 2300 (2009) (indicating that a categorical approach applies to the aggravated fel-

ony of illicit trafficking, including recidivist possession, and citing cases purporting to apply the categorical approach to recidivist possession).[4]

b. The court of appeals' interpretation also cannot be reconciled with the distinction drawn by Congress in the illegal reentry statute, 8 U.S.C. § 1326, between misdemeanor and aggravated felony drug convictions. In that statute, Congress established a maximum penalty of 20 years of imprisonment for illegal reentry subsequent to a conviction for an "aggravated felony." *Id.* § 1326(b)(2). In contrast, Con-

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[4] The aggravated felony at issue here differs in important respects from the aggravated felony at issue in *Nijhawan*. That offense requires conviction of "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). The initial language, "offense that . . . involves fraud or deceit," undisputedly requires a formal judgment by the convicting court of guilt of fraud or deceit. The need for a finding of fraud or deceit by the convicting court mirrors the need for a finding of recidivism here. But the ensuing language, "*in which* the loss . . . exceeds $10,000," is most naturally read to refer to the underlying factual circumstances rather than the conduct found by the convicting court. That language therefore permits the loss amount to be determined later by an IJ. Any contrary interpretation would leave the loss threshold "with little, if any, meaningful application," because there is "no widely applicable federal fraud statute that contains a relevant monetary loss threshold." *Nijhawan*, 129 S. Ct. at 2301. Here, by contrast, there is a "widely applicable federal statute" that requires a finding of recidivism, 21 U.S.C. § 844(a), and a number of federal and state drug offenses would qualify as aggravated felonies under petitioner's interpretation, *see* pp. 36-37, *infra*.

gress prescribed a maximum penalty of 10 years of imprisonment for illegal reentry subsequent to a conviction for "three or more misdemeanor crimes involving drugs." *Id.* § 1326(b).

Under the plain meaning of the reentry statute, persons who reenter the country subsequent to a conviction for three or more misdemeanor drug possession offenses are exposed to a 10-year statutory maximum. But under the court of appeals' interpretation, because such persons could have been (but were not) charged with recidivist possession, a federal felony, they would be exposed to the 20-year maximum for reentry subsequent to a conviction for an aggravated felony. Given § 1326's basic distinction between reentry subsequent to three or more drug misdemeanors and reentry subsequent to an aggravated felony, "it is impossible to believe that Congress intended [that 10-year] quantum leap in punishment." *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107 (2009).

Under an approach correctly focused on what the convicting court found, the existence of three or more misdemeanor possession convictions would expose an illegal reentrant to a 10-year statutory maximum, rather than the 20-year maximum reserved for aggravated felons. Only persons actually convicted of recidivist possession—persons whose convicting court made a finding of recidivism—would be exposed to the 20-year maximum. That approach, unlike the court of appeals' understanding, fully preserves the distinction in the illegal reentry statute between reentry subsequent to a conviction for three or more misdemeanors and reentry subsequent to a conviction for an aggravated felony.

4. The question whether recidivism is an offense element for constitutional purposes has no bearing on the issue in this case

a. The Government, invoking *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), suggests (Br. in Opp. 13) that recidivism may be found by an IJ rather than the convicting court under the INA because recidivism fails to constitute an offense element for constitutional purposes. The Government, however, offers no explanation why a holding that the *Constitution* permits a fact to be found by a court rather than a jury in a criminal trial could imply that the *INA* permits that fact to be found by an IJ rather than the convicting court.

In fact, the *constitutional* holding in *Almendarez-Torres* simply has no bearing on the *statutory* question presented by this case. The INA subjects to mandatory removal a person who has "been convicted" of a "felony" punishable under the federal drug laws. 8 U.S.C. § 1229b(a)(3). That language requires a formal judgment by the convicting court of the facts that make the offense a felony, regardless of whether those facts may be considered elements or non-elements for constitutional purposes. A person convicted of simple possession has not been "convicted" of a "felony" unless there has been a "formal judgment" by the convicting "court" of recidivism. *Id.* §§ 1101(a)(48)(A), 1229b(a)(3). Absent that finding by the convicting court, the defendant has been convicted of conduct that is a federal law misdemeanor, not a federal law felony. Nothing in *Almendarez-Torres* speaks to the issue, much less suggests otherwise.

b. Even assuming, *arguendo*, that the INA treats as an aggravated felony only a drug offense whose *elements* make it a felony, that result would not assist the Government. In that event, petitioner *still* would not have been convicted of an aggravated felony. In fact, if an offense could be considered an aggravated felony only if its elements rendered it a felony, *no* conviction for simple possession could count as an aggravated felony because the *elements* of simple possession never make it a felony. *See* 21 U.S.C. § 844(a); *Steele v. Blackman*, 236 F.3d 130, 137 (3d Cir. 2001) ("the only alternative" to treating recidivism as a fact that must be found by the convicting court "would be to treat any § 844 offense in this context as a misdemeanor"). Simple possession instead becomes a felony by virtue of the finding of a *non*-element—recidivism. For that reason, the Government's apparent reliance on *Almendarez-Torres* ultimately would prove far too much.

B. Recidivist Possession Is Not Punishable As A Federal Felony Absent A Prosecutorial Charge Of Recidivism And An Opportunity To Challenge Any Charged Prior Convictions

The absence of any finding of recidivism by the convicting court alone suffices to establish that petitioner has not been "convicted" of an aggravated felony. But petitioner's state law conviction does not qualify as an aggravated felony for the additional reason that his state proceeding failed to contain two critical features of any federal conviction for recidivist possession—a prosecutorial decision to bring a recidivism charge, and an opportunity by the defendant to challenge any alleged prior convictions.

1. Because a federal conviction for recidivist possession requires a prosecutorial screen and an opportunity to challenge a prior conviction, a corresponding state conviction must as well

Under federal law, a defendant may be punished for the felony of recidivist possession only if a federal prosecutor files a charge of recidivism identifying the previous convictions to be relied upon. 21 U.S.C. § 851(a)(1). In addition, a defendant charged as a recidivist possessor must be afforded an opportunity to challenge the prosecutor's reliance on the alleged prior convictions, including by challenging the fact or finality of any alleged conviction or by demonstrating that any prior conviction (within the preceding five years) was constitutionally invalid. *Id.* §§ 851(c), (e). If there has been no prosecutorial charge of recidivism or if the defendant successfully challenges the prior convictions, the defendant's conduct of drug possession is not "punishable" as a "felony" under the CSA, 18 U.S.C. § 924(c)(2).

The court of appeals' holding fails to respect those important statutory limitations. Rather, it permits an IJ to deem a conviction for simple possession "punishable" as a "felony" under the CSA even when there has been no prosecutorial charge of recidivism and no opportunity in the criminal proceeding to challenge the prior conviction. That approach stands fundamentally at odds with Congress's basic objectives in enacting 21 U.S.C. § 851.

a. Before the enactment of Section 851, a prosecutor bringing a drug possession charge was required to file an information "setting forth [any] prior convictions." *See United States v. Noland*, 495 F.2d 529, 530 (5th Cir. 1974), *see also* 26 U.S.C.

§ 7237(c)(2) (1964). The district court was then required to sentence the defendant as a recidivist unless the defendant could prove that he had no prior conviction. *See* 26 U.S.C. § 7237(c)(2) (1964).

By enacting Section 851, Congress sought to make the penalty structure for drug offenses "more flexible." H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. To that end, Congress prescribed that "[n]o person . . . shall be sentenced to increased punishment by reason of one or more prior convictions" unless the prosecutor elects to file an information alleging those prior convictions. 21 U.S.C. § 851(a)(1). That statutory directive embodies Congress's considered view that prosecutors possess the experience and judgment to determine the circumstances in which a charge of recidivism—and punishment as a recidivist—is appropriate in light of the defendant's "individual circumstances." *See* H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. By conditioning mandatory removal on conviction of an offense punishable as a felony under the CSA, Congress made the requirement of a prosecutorial screen a precondition to mandatory removal based on a conviction for recidivist possession.

The court of appeals' approach conflicts with the congressional determination to impose a prosecutorial screen. The court of appeals would give a prosecutor's charging decisions no weight. Instead, individuals like petitioner would be treated as recidivist felons even when, as here, a prosecutor expressly declines to charge them as a recidivist. *See* J.A. 32. And the system of careful and conscientious prosecutorial decision-making mandated by Congress would give way to a regime under which *any* person con-

victed of simple possession, if they have a prior drug conviction, would be deemed convicted of an aggravated felony. *See Alsol*, 548 F.3d at 217 (explaining that the standard adopted by the court below "intrude[s] on prosecutorial discretion to make charging decisions," and "undermin[es] the State's ability to negotiate plea agreements").

b. The court of appeals' approach also undermines Congress's prohibition against basing a felony sentence for recidivist possession on a constitutionally invalid prior conviction. Moreover, the court of appeals' holding does not merely shift the assessment of a prior conviction's validity from the convicting court to the IJ. Rather, it eliminates that assessment altogether because an IJ lacks authority to inquire into a prior conviction's validity. *See Alsol*, 548 F.3d at 217.

The court of appeals' understanding thus exposes a person convicted of simple possession to mandatory removal even if the prior drug conviction is constitutionally invalid. That danger is a real one. At least some number of misdemeanor convictions "involve indigent defendants whose convictions are processed under questionable circumstances and may be found invalid if challenged." *Rashid*, 531 F.3d at 447 (internal quotation marks omitted). By conditioning mandatory removal on conviction of conduct punishable as a felony under federal law, Congress avoided the unfairness of imposing mandatory deportation based on a prior conviction that could have been successfully challenged in a prosecution for recidivist possession. *See Alsol*, 548 F.3d at 217; *see also Rashid*, 531 F.3d at 446-47.

2. The Government's characterization of Section 851's requirements as "procedural" is both incorrect and irrelevant

a. The Government contends (Br. in Opp. 12) that the requirements of a prosecutorial screen and an opportunity to challenge a prior conviction are merely "procedural," and thus fail to override Congress's "substantive" determination to punish recidivist possession as a felony. The requirement of a prosecutorial decision to bring a recidivism charge, however, cannot be dismissed as merely "procedural." That requirement instead reflects a substantive judgment by Congress to refrain from imposing felony punishment on every drug possessor with a prior drug conviction, to instead separate those recidivist possessors who warrant felony treatment from those who do not, and to give the prosecutor substantive responsibility to examine the individual circumstances and determine whether felony treatment is justified. The court of appeals' holding fails to respect that substantive congressional judgment.

Section 851's requirement of an opportunity to challenge a prior conviction's validity likewise cannot be dismissed as merely "procedural." Instead, it reflects Congress's substantive judgment that convictions shown to be invalid should play no role in determining whether a defendant is guilty of the felony of recidivist possession. Because the court of appeals' holding allows an IJ to find that a defendant is punishable as a felon on the basis of an invalid prior conviction, it cannot be reconciled with that substantive congressional judgment.

b. At any rate, insofar as Section 851's institution of a prosecutorial screen and of an opportunity to challenge a prior conviction's validity could be de-

scribed as "procedural," that description would not undermine their fundamental importance. They remain absolute preconditions to a conviction under the CSA for the felony of recidivist possession. *See United States v. LaBonte*, 520 U.S. 751, 759-60 (1997) ("[F]or defendants who have received the [prosecutor's charge of prior convictions] under § 851(a)(1), . . . the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." (quoting 28 U.S.C. § 994(h))). Because of the fundamental importance of the prosecutorial screen and the opportunity challenge a prior conviction, they are necessary components for any state offense involving recidivism to be considered sufficiently "analogous" to the federal felony of recidivist possession. *See Lopez*, 549 U.S. at 57 n.8.

C. The Court Of Appeals' Interpretation Unnecessarily Visits Harsh Consequences On Permanent Resident Aliens Without Advancing The Government's Legitimate Interests

The court of appeals' interpretation of the INA has unusually severe consequences for persons who would otherwise benefit from discretionary cancellation of removal. At the same time, petitioner's interpretation would fully serve the government's interests in effecting the removal of criminal aliens and would leave the mandatory deportation provision with real and substantial effect.

1. The court of appeals' interpretation subjecting persons convicted of simple possession to mandatory deportation visits particularly harsh consequences on lawful permanent resident aliens with longstand-

ing ties to the country. Under that interpretation, even if a lawful permanent resident alien has lived and worked in this country for many years, and even if removal would impose serious hardships on his family, two convictions for minor drug possession would categorically preclude the Attorney General from exercising discretion to grant cancellation of removal. That would be true even if a prosecutor made a deliberate decision declining to prosecute the second possession offense as recidivist possession based on the equities in the case. Congress should not be presumed to have intended those severe consequences. *See INS v. Errico*, 385 U.S. 214, 225 (1966) (courts should "not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used" in a statute).

The facts of the case starkly illustrate the unusually harsh consequences of the court of appeals' approach. Petitioner came to the United States with his family at a young age. As a lawful permanent resident, petitioner worked as a carpet installer from the age of seventeen. Petitioner's immediate family, including his mother and sisters, remain in the United States. Petitioner and his fiancée, a United States citizen, have four children together, all of whom are United States citizens. Petitioner's removal therefore imposes substantial hardships not only on him, but also on his family. Yet the court of appeals' interpretation effectively banishes petitioner from the United States based on his possession of one tablet of Xanax, without permitting any individualized consideration of his longstanding ties to the country or the hardship caused to his family.

2. Conversely, maintaining petitioner's eligibility to seek discretionary cancellation of removal would not disserve the government's legitimate interests. That interpretation would confer no automatic entitlement to remain in the country. To the contrary, under the INA, any alien convicted of a drug related offense (other than one-time possession of a small quantity of marijuana) may be removed from the country. 8 U.S.C. § 1227(a)(2)(B)(i).

Preserving petitioner's eligibility to seek cancellation of removal would create no entitlement to remain in the country, but would afford him an opportunity to persuade the Attorney General that deportation is inappropriate in the particular circumstances. Moreover, in assessing the propriety of granting discretionary relief, an IJ may consider "the existence of a criminal record and, if so, its nature, recency, and seriousness," in addition to weighing such favorable factors as "family ties within the United States, residence of long duration in th[e] country . . . [and] evidence of hardship to the respondent and his family if deportation occurs." *In re C-V-T*, 21 I. & N. Dec. 7, 11 (B.I.A. 1998). Accordingly, while an IJ could not subject a lawful permanent resident to mandatory removal based on a prior offense not found by the convicting court, the IJ could consider that conviction in deciding whether to grant discretionary relief from removal. *Id.* That approach fairly balances the interest of an individual with longstanding ties to the country in remaining here against the government's interest in effecting the removal of aliens whose criminal history calls for that outcome.

3. Petitioner's interpretation gives "real and substantial effect" to Congress's judgment that certain

drug convictions warrant a criminal alien's mandatory removal from the country. *Stone v. INS*, 514 U.S. 386, 397 (1985). Persons convicted of recidivist possession under Section 844 or under a corresponding state law offense remain subject to mandatory deportation. Recidivist possession offenses, in any event, constitute only a fraction of the drug offenses intended by Congress to constitute aggravated felonies. Congress subjected to mandatory deportation persons convicted of any "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). That overarching standard encompasses a conviction for *any* state or federal offense involving commercial activity in connection with federally controlled substances. *Lopez*, 549 U.S. at 53-54. Under that general standard, there is no requirement that a state trafficking offense correspond to a federal drug offense. *See* 8 U.S.C. § 1101(a)(43)(B).

To be sure, petitioner's interpretation would exclude from treatment as an aggravated felony those state possession offenses that fail to correspond to the federal recidivist possession offense in 21 U.S.C. § 844(a). But that is the inevitable result of Congress's election to include state possession offenses, as opposed to state trafficking offenses, only if they are "analogous to" a federal felony. *Lopez*, 549 U.S. at 57 n.8. For instance, as the Court recognized in *Lopez*, state offenses that increase penalties for possession based on quantity would not be analogous to the federal felony of possession with intent to distribute, and therefore would fail to count as aggravated felonies. *Id.* at 59-60. A state possession offense that departs from the offense of recidivist possession under Section 844(a) similarly fails to qualify as an aggravated felony.

Again, such a state offense may still bear on the decision whether to remove a person from the country. In deciding whether to grant or withhold discretionary relief from removal, the Attorney General may take into account the applicant's prior convictions. The dissimilarity of a state possession offense to recidivist possession under Section 844(a) only means that, in accordance with Congress's intent, a conviction for that state offense would not automatically compel removal.

D. Insofar As The Statutory Terms Admit Any Ambiguity, Principles Of Lenity Would Compel Construing The Terms In Petitioner's Favor

The terms of the INA and the other relevant sources of statutory interpretation demonstrate that a person convicted of simple possession cannot be considered convicted of an aggravated felony on the theory that he could have been charged with recidivist possession. To the extent there exists any ambiguity on that interpretive question, principles of lenity would require construing the statute in petitioner's favor. Indeed, this case involves the confluence of two principles of lenity, both of which, independently and in combination, compel rejection of the court of appeals' interpretation.

First, as explained, this case implicates the rule that ambiguities in immigration statutes governing deportation must be construed in favor of the alien. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Errico*, 385 U.S. at 225. In addition, the criminal rule of lenity requires an interpretation favoring petitioner. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the am-

bit of criminal statutes should be resolved in favor of lenity"). The criminal rule of lenity applies here because the definition of "drug trafficking crime" at issue comes from the criminal code and is used for criminal law purposes. *See* 18 U.S.C. § 924(c). Additionally, while the INA defines the terms "conviction" and "aggravated felony," they also bear on the maximum sentence for criminal reentry offenses. *See* 8 U.S.C. § 1326(b). When statutory terms are used for both immigration and criminal law purposes, the criminal rule of lenity applies. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

For all the reasons explained, a person convicted of simple possession of drugs, with no charge or finding of recidivism in the convicting court, has not "been convicted" of the aggravated felony of recidivist possession within the meaning of the INA. 8 U.S.C. § 1229b(a)(3). At the very least, however, the INA is ambiguous on the matter, thus requiring the application of lenity principles. Indeed, one can readily imagine situations in which a permanent resident alien pleads guilty to simple possession, thereby avoiding any possibility of a charge of recidivist possession, precisely to ensure that he is convicted of a misdemeanor rather than a felony so as to retain eligibility to seek discretionary cancellation of removal. *See INS v. St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). It is difficult enough to accept that such a person, although intending to plead guilty to misdemeanor simple possession, unwittingly pleaded guilty to felony recidivist possession despite the absence of any charge or

finding of recidivism. But it is virtually inconceivable to suppose that he *unambiguously* pleaded guilty to the felony of recidivist possession even though there was no charge or finding of recidivism.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

The United States Code, 8 U.S.C. § 1101(a)(43)(B), 8 U.S.C. § 1101(a)(48)(A), 8 U.S.C. § 1227(a)(2)(B)(i), 8 U.S.C. § 1229b(a), 18 U.S.C. § 924(c)(2), 21 U.S.C. § 844, and 21 U.S.C. § 851, provides in pertinent part as follows:

8 U.S.C. § 1101(a)(43)(B)
§ 1101. Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

* * *

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)[.]

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law[.]

8 U.S.C. § 1101(a)(48)(A)
§ 1101. Definitions

(a) As used in this chapter—

* * *

(48) (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1227(a)(2)(B)(i)
§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

* * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1229b(a)
§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

18 U.S.C. § 924(c)(2)
§ 924. Penalties

* * *

(c)

* * *

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

21 U.S.C. § 844
§ 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has

ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of

the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

* * *

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term " drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or

conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

21 U.S.C. § 851
§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part [21 U.S.C. §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any

issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing

sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

RESPONDENT'S BRIEF

145

(5)

Supreme Court, U.S.
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No. 09-60

In the Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State applied a recidivist enhancement in that second or subsequent conviction.

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In the Supreme Court of the United States

No. 09-60

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 570 F.3d 263. The opinion of the Board of Immigration Appeals (Pet. App. 11a-69a) is reported at 24 I. & N. Dec. 382. The opinion of the immigration judge (Pet. App. 70a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2009. The petition for a writ of certiorari was filed on July 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has "been convicted of a violation of * * * any law * * * of a State

* * * relating to a controlled substance" is removable. 8 U.S.C. 1227(a)(2)(B)(i). Although certain aliens may seek discretionary cancellation of removal under 8 U.S.C. 1229b(a), an alien who has been convicted of an "aggravated felony" is ineligible for such relief. 8 U.S.C. 1229b(a)(3). The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. As relevant here, the list includes "illicit trafficking in a controlled substance * * *, including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U.S.C. 1101(a)(43)(B), whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act [(CSA)] (21 U.S.C. 801 et seq.)."

One provision of the CSA, 21 U.S.C. 844(a), makes it "unlawful for any person knowingly or intentionally to possess a controlled substance" without a prescription. Although in most circumstances a defendant is subject to imprisonment for "not more than 1 year" for his first possession conviction under Section 844, "if [the defendant] commits such offense after a prior conviction under [chapter 13 of Title 21] * * *, or a prior conviction for any drug * * * offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for * * * not more than 2 years." *Ibid.*[1] The higher term of imprisonment for a second or subsequent conviction cannot, however, be

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[1] Some first possession offenses are subject to a felony sentence. See 21 U.S.C. 844(a) (first possession of more than five grams of substance containing cocaine base subject to five-year minimum sentence; first possession of flunitrazepam subject to imprisonment for up to three years).

imposed on a defendant unless certain procedural steps have been followed. Section 851 of Title 21 provides that "[n]o person who stands convicted of an offense under [the CSA] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court * * * stating in writing the previous convictions to be relied upon," and the defendant is afforded an opportunity to challenge the validity of the prior conviction in a hearing before the court. 21 U.S.C. 851(a) and (c).

2. a. In 2004, petitioner, a native and citizen of Mexico and a lawful permanent resident of the United States, was convicted in Texas state court of possessing two ounces or less of marijuana, a Class B misdemeanor, in violation of Tex. Health & Safety Code Ann. § 481.121(a) and (b)(1) (Vernon 2003). He was sentenced to 20 days in jail. Pet. App. 1a-2a, 13a; Administrative Record (A.R.) 540-542. Petitioner was again convicted of drug possession in Texas state court in 2005, this time for possessing less than 28 grams of Alprazolam (known commercially as Xanax), a Class A misdemeanor, in violation of Tex. Health & Safety Code Ann. § 481.117(a) and (b) (Vernon 2003), for which he received a 10-day jail sentence. Pet. App. 2a; A.R. 546-547. Although Texas has a recidivist enhancement statute applicable to some subsequent misdemeanor convictions, the statute did not provide an enhancement for petitioner's second controlled substance conviction (a Class A offense) based on his first such conviction (a Class B offense). See Tex. Penal Code Ann. § 12.43(a)(2) (Vernon 2003) (providing enhanced sentence for a recidivist Class A misdemeanor conviction, but only if it follows a prior conviction for a Class A misdemeanor or a felony).

b. In 2006, petitioner was charged with removability under 8 U.S.C. 1227(a)(2)(B)(i) for having been convicted of a controlled substance offense. Pet. App. 2a. The Notice to Appear identified each of petitioner's state possession convictions. *Id.* at 71a. Appearing pro se before the immigration judge (IJ), petitioner admitted the convictions, and the IJ found him removable as charged. *Ibid.*; A.R. 463.

Petitioner submitted an application for cancellation of removal under 8 U.S.C. 1229b(a). A.R. 527-535. The IJ denied the application on the ground that petitioner was ineligible for such relief. Pet. App. 70a-75a. In reaching that conclusion, the IJ relied on this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), which held that the determination whether a state drug offense constitutes an aggravated felony under the INA does not turn on the State's classification of the offense as a felony, but rather on whether the offense is punishable as a felony under federal law. See 549 U.S. at 55 & n.6, 58-60. The IJ determined that petitioner's second state drug possession offense constituted an "aggravated felony" because it "carries the potential for incarceration of more than a year under federal law," and that petitioner was therefore ineligible for cancellation of removal. Pet. App. 73a; see 8 U.S.C. 1229b(a)(3). The IJ ordered petitioner removed to Mexico. Pet. App. 75a.

c. The Board of Immigration Appeals (Board) affirmed in a divided en banc decision. Pet. App. 11a-69a. The majority stated that, because the question whether petitioner's second conviction for drug possession constituted an "aggravated felony" concerned the interpretation of criminal statutes, the Board would defer to precedent (if any) on the issue in the applicable federal court of appeals. *Id.* at 17a-18a. The majority concluded

that the Fifth Circuit, whose law governed petitioner's case, had held in the criminal sentencing context that a second possession conviction qualified as an "aggravated felony," even when the conviction had not "been entered in a proceeding that complied with the procedural requirements for Federal recidivist treatment." *Id.* at 20a (citing *United States* v. *Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006), overruled in part on other grounds by *Lopez* v. *Gonzales*, 549 U.S. 47 (2006)). On that basis, the Board dismissed petitioner's appeal. *Id.* at 32a-33a.

Although the issue was not presented in petitioner's case, the Board majority went on to determine what position the Board would adopt in cases arising in federal circuits that had not decided the issue. See Pet. App. 22a-31a. The Board majority concluded that in those cases, in order for a second or successive state drug possession conviction to qualify as an aggravated felony, "the respondent's status as a recidivist drug possessor must have been admitted or determined by a court or jury within the prosecution for the second drug crime." *Id.* at 28a. The majority emphasized that, under federal law, Section 851 "precludes a Federal judge from enhancing a drug offender's sentence on the basis of recidivism absent compliance with a number of safeguards." *Id.* at 23a. The majority acknowledged that the procedural steps set forth in Section 851 are not "elements" of the criminal violation. *Ibid.* But the majority determined that "recidivist possession" constituted "an amalgam of elements, substantive sentencing factors, and procedural safeguards," and that the Board was required to apply some version of the "categorical approach" established by this Court in *Taylor* v. *United*

States, 495 U.S. 575 (1990), to the "'nonelement' facts" that define recidivism possession. Pet. App. 24a.

Recognizing that state recidivism procedures will inevitably differ from those in Section 851, the majority determined that, in order to qualify as an aggravated felony, the state procedures must, at a minimum, have "provid[ed] the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper." Pet. App. 27a. The majority observed that it was leaving unresolved several questions that might arise in future cases, such as whether the State "must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with" what Section 851 provides for in federal prosecutions, as well as "the timing of notice, or * * * the burdens and standards of proof." *Id.* at 32a n.10.

Two members of the Board concurred in the dismissal of petitioner's appeal, but found the majority's analysis inconsistent with *Lopez*. Pet. App. 33a-69a. In *Lopez*, the concurring members explained, this Court adopted what has since been called a "hypothetical Federal felony" rule, under "which a court examines the elements of the controlled substance offense as charged by the State and compares that offense * * * to see whether, if federally prosecuted under such a corresponding statute, the State offense would be a felony." *Id.* at 36a-37a. Under that method of analysis, the two Board members reasoned, a second or subsequent drug possession offense constitutes an aggravated felony if the defendant had a final prior drug-related conviction before the commission of the subsequent offense. *Id.* at 42a-43a. The relevant question is whether a federal prosecutor "presented with the elements of such an offense *could* elect to use 21 U.S.C. § 844(a) * * * to bring a

felony prosecution." *Id.* at 61a. That possibility makes the offense "'analogous' to" a felony punishable under the CSA. *Ibid.* Thus, although the concurring members disagreed that the Board was bound by pre-*Lopez* Fifth Circuit precedent, *id.* at 40a, they agreed that petitioner's second state conviction for drug possession qualified as an aggravated felony, *id.* at 68a-69a.

3. Petitioner sought review in the Fifth Circuit, which denied his petition for review. Pet. App. 1a-10a. The court of appeals held that petitioner's claim that his second state possession conviction did not qualify as an aggravated felony was foreclosed by the court's decision in *United States* v. *Cepeda-Rios*, 530 F.3d 333, 335-336 (5th Cir. 2008) (per curiam), which held that *Lopez* did not overrule the circuit's earlier holding in *United States* v. *Sanchez-Villalobos*, 412 F.3d 572, 576-577 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006). Pet. App. 6a. Under the "'hypothetical' approach in *Sanchez-Villalobos*," a second possession conviction for conduct that "could have been punished as a felony under federal law qualifie[s] as an aggravated felony." *Ibid.* The court of appeals observed that *Lopez* had reaffirmed that "federal law should control" the determination whether the offense conduct qualifies as a drug trafficking offense and that this Court had specifically recognized that Congress had "define[d] some possession offenses as 'illicit trafficking'" including "recidivist possession." *Id.* at 8a-9a & n.6 (quoting *Lopez*, 549 U.S. at 55 n.6). Because petitioner had been convicted in state court of conduct that "could have been punished as a felony under federal law," his second state possession conviction qualified as an aggravated felony. *Id.* at 6a; see *id.* at 5a (quoting *Lopez*, 549 U.S. at 60 ("a state offense constitutes a 'fel-

ony punishable under the [CSA]' only if it proscribes conduct punishable as a felony under that federal law")).

DISCUSSION

The court of appeals correctly determined that petitioner is ineligible for cancellation of removal under 8 U.S.C. 1229b(a)(3) because his second conviction under Texas law for drug possession is an "aggravated felony" as defined in 8 U.S.C. 1101(a)(43)(B). The United States agrees with petitioner, however, that the question presented is an important and recurring one on which there is a conflict among the courts of appeals. Review by this Court would therefore be appropriate.

1. a. The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. Any offense "described in" that list, "whether in violation of Federal or State law," is an aggravated felony. 8 U.S.C. 1101(a)(43) (penultimate sentence). As relevant here, the list refers to "illicit trafficking in a controlled substance * * *, including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). In turn, 18 U.S.C. 924(c)(2) defines "drug trafficking crime" in relevant part as "any felony punishable under the [CSA]."

b. In *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), this Court considered whether a state conviction that was defined as a felony under state law, but which would be a misdemeanor under the CSA, qualifies as an "aggravated felony." The Court held that it does not. The Court explained that the definition of a "drug trafficking crime" in Section 924(c)(2) requires that the offense be "punishable as a felony under the federal Act." *Id.* at 55. "[A] state offense constitutes a 'felony punishable under the Controlled Substances Act,'" the Court con-

cluded, "only if it proscribes conduct punishable as a felony under that federal law." *Id.* at 60 (citation omitted).

The Court emphasized that Congress did not intend the determination of what constitutes a qualifying drug trafficking offense to vary with state criminal classifications. Congress instead intended the determination to be based on "the classifications Congress itself chose." *Lopez*, 549 U.S. at 58; see *id.* at 59 ("[I]t is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers.").

Although observing that the phrase "drug trafficking crime" might appear not to include drug possession offenses, *Lopez*, 549 U.S. at 53-54, the Court recognized that by defining the phrase as it had—to encompass any "felony punishable under the [CSA]," 18 U.S.C. 924(c)(2)—Congress had included certain possession offenses within the definition. *Lopez*, 549 U.S. at 54 & 55 n.6. In particular, the Court explained:

> Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2), such as possession of cocaine base *and recidivist possession*, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2).

Id. at 55 n.6 (emphasis added).

c. The CSA generally treats a first offense for possession as a misdemeanor. 21 U.S.C. 844(a). But, as the Court recognized in *Lopez* in the passage just quoted, recidivist possession is punishable under the CSA as a felony. If the defendant possesses a controlled substance in violation of Section 844 after any prior state or

federal drug conviction "has become final, [the offender] shall be sentenced to a term of imprisonment for * * * not more than 2 years." *Ibid.*

In order to impose the felony sentence authorized by Section 844(a) on a recidivist possessor of controlled substances under the CSA, the government and court must follow a set of procedural steps set forth in Section 851 of Title 21. The government must give notice, by way of an information, of the prior conviction on which the government intends to rely, 21 U.S.C. 851(a)(1), and, if the defendant contests the allegations concerning the prior conviction, the court, sitting without a jury, must decide the issue, 21 U.S.C. 851(c)(1).[2]

2. The court of appeals correctly held that petitioner's second conviction for drug possession qualifies as an "aggravated felony" because that conduct was "punishable as a felony under [the CSA]." *Lopez*, 549 U.S. at 60; see Pet. App. 6a (petitioner's "second state possession offense * * * could have been punished as a felony under federal law"). Petitioner contends (Pet. 19) that his second state drug possession conviction does not qualify because the State of Texas did not apply a recidivism enhancement in connection with his second possession prosecution. But, as this Court has emphasized, whether a conviction qualifies as an aggravated felony does not depend on how the State chooses to treat the

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[2] If the defendant contends that the prior conviction was obtained in violation of the Constitution, the defendant must prove that claim by a preponderance of the evidence, 21 U.S.C. 851(c)(2), but the government otherwise has the burden of proving any issue of fact concerning the prior conviction beyond a reasonable doubt, 21 U.S.C. 851(c)(1). The defendant may not challenge the validity of a conviction that occurred more than five years earlier. 21 U.S.C. 851(e).

offense, but on "the classifications Congress itself chose" for the conduct at issue. *Lopez*, 549 U.S. at 58.

Congress has provided that "a prior conviction under [chapter 13 of Title 21], or a prior conviction for *any* drug, narcotic, or chemical offense chargeable under the law of any State," subjects a defendant to imprisonment for up to two years for violating Section 844(a). See 21 U.S.C. 844(a) (emphasis added). Petitioner does not dispute that he was subject to treatment as a recidivist under Section 844(a) based on his prior state Class B conviction, and that he therefore could have received a felony sentence in federal court for his second possession offense. Pet. 18-19.

The Texas legislature has made a different policy choice than Congress. Under Texas law, a recidivism enhancement may be applied to a Class A misdemeanor only when "the defendant has been before convicted of a Class A misdemeanor or any degree of felony." Tex. Penal Code Ann. § 12.43(a)(2) (Vernon 2003). Petitioner's second possession offense was a Class A misdemeanor. A.R. 547. But because petitioner's first possession conviction was a Class B misdemeanor, A.R. 542, that conviction could not support a recidivism enhancement for the second drug possession offense under Texas law.

How Texas chooses to treat recidivism enhancements is, however, irrelevant. Under *Lopez*, what matters is that the defendant's second possession offense was "punishable as a felony under [the CSA]." *Lopez*, 549 U.S. at 60. Federal law does not distinguish between different kinds of prior drug offenses for purposes of subjecting a second or subsequent possession conviction to punishment as a felony. The State's choice not to impose a recidivism enhancement does not alter

this feature of federal law, which determines that petitioner's conviction qualifies as an aggravated felony.

Petitioner contends (Pet. 22-23) that the court of appeals' approach is inconsistent with 21 U.S.C. 851, which requires adherence to certain specified procedures to establish a prior conviction before a felony sentence can be imposed for a violation of Section 844(a). But those procedural steps for a recidivist enhancement in a federal prosecution are distinct from Congress's fundamental substantive classification determination under Section 844(a) that a second drug possession offense is "punishable as a felony under [the CSA]." *Lopez*, 549 U.S. at 60. It is that substantive classification that controls in concluding that petitioner's second drug offense is an aggravated felony.

Petitioner's contrary position, if adopted, would work a dramatic change in the way this Court has compared analogous federal and state crimes in other contexts. In adopting that position for cases arising in other circuits, the Board reasoned that, in light of Section 851, "'recidivist possession' is not defined in relation to 'elements,'" but rather "is an amalgam of elements, substantive sentencing factors, and procedural safeguards, many of which need never have been submitted to a jury." Pet. App. 23a. Although recognizing that the categorical approach developed by this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), had never been applied to such "'nonelement' facts," Pet. App. 24a, the Board proceeded to adopt just this approach. The Board concluded that a state conviction would be sufficiently comparable to a federal prosecution that complied with Section 851 only when "the respondent's status as a recidivist drug possessor [was] admitted or determined by a court or jury within the prosecution for the second drug

crime." *Id.* at 28a. The Board acknowledged, however, that its decision to apply *Taylor* to federal procedural "nonelement[s]" raised a host of questions, such as whether the State "must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with" Section 851, as well as "the timing of notice, or * * * the burdens and standards of proof." *Id.* at 32a n.10. Notably, the Board left all these questions for another day.

The Board erred in applying the analysis of *Taylor* in this context. The defendant's status as a recidivist for purposes of a sentencing enhancement is not an element of the crime, and therefore is permissibly assigned to the sentencing judge. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 243-244 (1998). As a consequence, the practices of States regarding when and how recidivism can be established vary widely. See Pet. App. 27a (acknowledging certain aspects of that variety). As the Board's own opinion shows, courts will quickly become mired in the intricacies of comparing different state procedural schemes with that established in Section 851. And this inquiry is in any event irrelevant given Congress's express determination that a conviction under Section 844(a) is a felony when the defendant has a final "prior conviction for any drug * * * offense chargeable under the law of any State." 21 U.S.C. 844(a). See *United States* v. *Severino*, 316 F.3d 939, 943 (9th Cir.) (en banc) ("Section 851 is a procedural statute; the facts and the law either exist to enhance defendant's sentence or they don't—section 851(a) doesn't change that."), cert. denied, 540 U.S. 827 (2003).[3]

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[3] In *Severino*, the Ninth Circuit reserved the question "whether a Section 851(a) error can be waived or forfeited by a defendant." 316

3. Since *Lopez*, a conflict has developed among the courts of appeals on the question presented in this case, as it arises in two different contexts. Four courts have addressed the issue in the civil immigration context in which this case arises. The Fifth Circuit (in the present case) and the Seventh Circuit have held that a second state conviction for drug possession qualifies as an "aggravated felony" regardless whether the second state prosecution relied upon the defendant's status as a recidivist. See Pet. App. 6a; *Fernandez* v. *Mukasey*, 544 F.3d 862, 867-869 (7th Cir. 2008), petition for cert. pending, No. 09-5386 (filed July 15, 2009). The Second and Sixth Circuits, by contrast, have held that, for an alien to have been convicted of an "aggravated felony," his status as a recidivist must have been adjudicated in the second or subsequent drug possession prosecution. See *Alsol* v. *Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008); *Rashid* v. *Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008).[4] In addition, the Board of Immigration Appeals applies essentially the same construction in any case arising in

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F.3d at 947 n.5. With the exception of the Eleventh Circuit, every other court of appeals to decide the issue has held that a Section 851(a) error is not jurisdictional and therefore is subject to waiver and forfeiture. See Pet. at 17-18, *United States* v. *Bowden*, petition for cert. pending, No. 09-244 (filed Aug. 27, 2009) (discussing cases). The United States has petitioned for a writ of certiorari seeking summary reversal of the Eleventh Circuit's ruling. *Id.* at 23-24.

[4] Petitioner also cites (Pet. 9-10) two pre-*Lopez* decisions, *Berhe* v. *Gonzales*, 464 F.3d 74 (1st Cir. 2006), and *Steele* v. *Blackman*, 236 F.3d 130 (3d Cir. 2001), as further evidence of a conflict that warrants review. Because *Lopez* clarified the meaning and scope of a "drug trafficking crime," specifically stating that "recidivist possession * * * clearly fall[s] within the definition[]," 549 U.S. at 55 n.6, pre-*Lopez* decisions do not present a square conflict.

a circuit in which there is no controlling precedent to the contrary, Pet. App. 20a-21a.

Three of the courts of appeals that have resolved the issue in the immigration context have also addressed it and reached the same conclusions in the criminal sentencing context. Sentencing Guidelines 2L1.2 provides for a sentencing enhancement when an alien reenters the country illegally after "a conviction for an aggravated felony," which the commentary defines by reference to 8 U.S.C. 1101(a)(43). Sentencing Guidelines § 2L1.2(b)(1)(C); see *id.* comment. (n.3(A)). The Fifth and Seventh Circuits have held that, in applying the Guidelines, as in the immigration context, a second or subsequent state drug possession conviction qualifies as an "aggravated felony," whether or not the State applied its own recidivism provisions. See *United States* v. *Cepeda-Rios*, 530 F.3d 333, 335-336 (5th Cir. 2008); *United States* v. *Pacheco-Diaz*, 506 F.3d 545, 550 (7th Cir. 2007), rehearing denied, 513 F.3d 776, 778-779 (7th Cir. 2008) (per curiam). The Second Circuit, on the other hand, applies its contrary rule in the sentencing context, as it does in the immigration context. See *United States* v. *Ayon-Robles*, 557 F.3d 110, 112-113 (2009).

This Court has previously denied review of the issue in numerous cases in which it was presented in the Sentencing Guidelines context. See *Erazo-Villatoro* v. *United States*, cert. denied, No. 09-5589 (Nov. 2, 2009); *Cruz-Meza* v. *United States*, cert. denied, No. 08-10362 (Oct. 5, 2009); *Izaguirre-Meza* v. *United States*, 129 S. Ct. 2865 (2009) (No. 08-9580); *Guevara-Barrera* v. *United States*, 129 S. Ct. 2792 (2009) (No. 08-9160); *Gutierrez-Quintanilla* v. *United States*, 129 S. Ct. 2381 (2009) (No. 08-8537); *Del Real-Hurtado* v. *United States*, 129 S. Ct. 1986 (2009) (No. 08-8143); and

Pacheco-Sanchez v. *United States*, 129 S. Ct. 905 (2009) (No. 08-6673). In its briefs in opposition in those cases, the government noted that they concerned the proper interpretation of the Sentencing Guidelines, which are only advisory in light of this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), and that the Sentencing Commission could resolve conflicting interpretations of the Guidelines through its annual amendment process. See, *e.g.*, U.S. Br. in Opp. 12-14, *Erazo-Villatoro*, *supra*, No. 09-5589.

This is the first post-*Lopez* case in which the issue has been presented in the immigration context following final rejection of the alien's claim by the court of appeals.[5] Application of the "aggravated felony" definition in immigration cases is not advisory, as under the Sentencing Guidelines. In the view of the United States, the present case would serve as an appropriate vehicle for this Court to resolve the conflict in the immigration context. The present case arises out of a removal proceeding in which the en banc Board of Immigration Appeals addressed the question presented in light of this Court's decision in *Lopez*. A decision by this Court would resolve the circuit conflict and establish a uniform rule to be applied by both the Board and the courts of appeals.[6]

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[5] The Court denied certiorari in another immigration-related case, *Spence* v. *Holder*, cert. denied, No. 08-9882 (Oct. 5, 2009), but there petitioner sought certiorari before judgment.

[6] The issue is also presented in three other pending immigration petitions: *Fernandez* v. *Holder*, No. 09-5386 (filed July 15, 2009); *Escobar* v. *Holder*, No. 09-203 (filed Aug. 17, 2009); and *Cardona-Lopez* v. *Holder*, No. 09-539 (filed Oct. 31, 2009). The government suggests that the Court hold those petitions and dispose of them in light of the Court's resolution of the question presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2009

RESPONDENT'S BRIEF

MAR 1 - 2010

(14)

No. 09-60

In the Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

An alien who has been convicted of an aggravated felony is ineligible, *inter alia*, for cancellation of removal. Under 8 U.S.C. 1101(a)(43)(B), an "aggravated felony" includes any "drug trafficking crime," which is defined in 18 U.S.C. 924(c)(2) to include any "felony punishable under the Controlled Substances Act." Under one provision in the Controlled Substances Act, 21 U.S.C. 844(a), a person who commits a drug possession offense after his conviction for a prior drug offense has become final may be punished as a felon.

The question presented is whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State actually applied a recidivist sentencing enhancement, using procedures like those applicable in federal court, in the prosecution for the second or subsequent offense.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 570 F.3d 263. The opinion of the Board of Immigration Appeals (Pet. App. 11a-69a) is reported at 24 I. & N. Dec. 382. The opinion of the immigration judge (Pet. App. 70a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2009. The petition for a writ of certiorari was filed on July 15, 2009, and was granted on December 14, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

This case concerns the "aggravated felony" provisions of the Immigration and Nationality Act, which Congress put in place in order to speed removal of certain criminal aliens. An alien who has been convicted of an aggravated felony is ineligible for cancellation of removal. 8 U.S.C. 1229b(a)(3). The "aggravated felony" at issue here is a "drug trafficking crime," which is defined to include any offense that is "punishable under the Controlled Substances Act [CSA]" as a "felony." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). Under one provision in the Controlled Substances Act, 21 U.S.C. 844(a), a person who commits a drug possession offense after his conviction for a prior drug offense has become final may be punished as a felon.

Petitioner is a citizen of Mexico. After obtaining lawful permanent residency in the United States, he committed a variety of crimes. He was convicted, *inter alia*, of two state drug possession offenses. The Department of Homeland Security charged petitioner with being removable, which he did not contest. Petitioner sought cancellation of removal, but the immigration judge found him ineligible for that discretionary relief because his second drug possession offense was punishable as a felony under the CSA and therefore qualifies as an "aggravated felony." The Board of Immigration Appeals, following circuit precedent, affirmed. The court of appeals denied petitioner's petition for review, holding that his second drug offense is an aggravated felony because he could be punished for that offense as a felon under federal law.

1. In the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Congress defined a variety of crimes as "aggravated felon[ies]," and then provided for

certain immigration consequences if an alien is convicted of such an offense.[1] Congress took this step to respond to ongoing concerns about the serious problems caused by aliens who commit crimes in the United States, especially those who engage in repeated criminal activity. See pp. 38-41, *infra*.

The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. Any offense "described in" that list qualifies as an aggravated felony, regardless whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). As relevant here, the list includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Under 18 U.S.C. 924(c)(2), the term "drug trafficking crime" includes

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[1] See, *e.g.*, 8 U.S.C. 1227(a)(2)(A)(iii) (removability), 1158(b)(2)(A)(ii) and (B)(i) (asylum ineligibility), 1229b(a)(3) (cancellation ineligibility), 1101(f)(8) and 1229c(b)(1)(B) (voluntary departure ineligibility), 1326(a) and (b)(2) (increased statutory maximum penalty for illegal re-entry following conviction for an aggravated felony).

A conviction for an aggravated felony does not preclude all immigration relief, however. Withholding of removal is available unless the sentence imposed for the aggravated felony was five years or more, 8 U.S.C. 1231(b)(3)(B)(ii), and an alien with an aggravated felony conviction remains eligible for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, see 8 C.F.R. 208.16(d)(2)-(3), 208.17, 1208.16(d)(2)-(3), 1208.17. Although an alien convicted of an aggravated felony is barred from seeking readmission following removal, the bar is subject to waiver by the Attorney General. 8 U.S.C. 1182(a)(9)(A)(i)-(iii).

"any felony punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2).

The CSA in turn makes it "unlawful for any person knowingly or intentionally to possess a controlled substance" without a prescription. 21 U.S.C. 844(a). Although generally a defendant is subject to imprisonment for "not more than 1 year" for a drug possession offense, "if [the defendant] commits such offense after a prior conviction under [chapter 13 of Title 21] * * *, or a prior conviction for any drug * * * offense chargeable under the law of any State, has become final," he is subject to imprisonment for "not more than 2 years." *Ibid.*[2] A federal offense is a "felony" if the "maximum term of imprisonment authorized" for the offense is "more than one year." 18 U.S.C. 3559(a). Thus, a second or subsequent drug possession offense may be punished as a felony under federal law.

In order to impose the longer term of imprisonment for a second or subsequent drug possession conviction under the CSA, certain procedures must be followed. See 21 U.S.C. 851.[3] Such a sentence may not be imposed unless, "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court * * * stating in writing the previous convictions to be relied upon," and the defendant is afforded an op-

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[2] Some first possession offenses are also subject to a felony sentence. See 21 U.S.C. 844(a) (first possession of more than five grams of substance containing cocaine base subject to five-year minimum sentence; first possession of flunitrazepam—a substance commonly known as a date-rape drug—subject to imprisonment for up to three years).

[3] These procedures are not unique to Section 844; they are required to sentence any person convicted of an offense under 21 U.S.C. 841-865 to enhanced punishment based on the fact of a prior conviction. See 21 U.S.C. 851(a)(1).

portunity to challenge the validity of the prior convictions in a hearing before the court, except that a prior conviction may not be challenged if it was entered more than five years earlier. 21 U.S.C. 851(a)(1), (c) and (e).

The Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b(a). Cancellation of removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (internal quotation marks omitted). To obtain cancellation of removal, the alien must demonstrate in the removal proceedings both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. See *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998). A favorable exercise of discretion is warranted only when, after "balanc[ing] the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf," "the granting of . . . relief appears in the best interest of this country." *Id.* at 11 (brackets in original) (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)). Congress has determined that aliens who have been "convicted of any aggravated felony" are not eligible for cancellation of removal. 8 U.S.C. 1229b(a)(3).

2. Petitioner is a native and citizen of Mexico. Pet. App. 13a. In 1993, he became a lawful permanent resident of the United States. *Id.* at 1a. By 2006, petitioner had accumulated two convictions for possessing illegal drugs, one conviction for domestic violence assault, and two convictions for driving with an invalid license. J.A. 43a-44a, 88a-89a, 105a-109a; see J.A. 121a (observation by immigration judge (IJ) that petitioner "got in trouble every year for the last five years").

At issue here are petitioner's two state convictions for drug possession. In 2004, petitioner was convicted in Texas state court of possessing two ounces or less of marijuana, a Class B misdemeanor, in violation of Tex. Health & Safety Code Ann. § 481.121(a) and (b)(1) (Vernon 2003). J.A. 16a-27a. He was sentenced to 20 days in jail. Pet. App. 1a-2a, 13a; J.A. 20a. In 2005, petitioner was again convicted of drug possession in Texas state court, this time for possessing less than 28 grams of alprazolam (known commercially as Xanax), a Class A misdemeanor, in violation of Tex. Health & Safety Code Ann. § 481.117(a) and (b) (Vernon 2003). J.A. 28a-39a.[4] Petitioner received a 10-day jail sentence for that offense. Pet. App. 2a; J.A. 32a-33a.

Although Texas law provides increased penalties for some recidivist drug offenses, no such enhancement was available here. The Texas recidivist enhancement statute authorizes an enhanced sentence if the defendant's second drug offense is in the same class as the first offense or was a felony, but not if the second offense is in a different offense class. See Tex. Penal Code Ann. § 12.43(a)(2) (Vernon 2003). Thus, the statute did not permit an enhancement for petitioner's second controlled substance conviction because that conviction was for a Class A misdemeanor offense, whereas his first conviction was for a Class B misdemeanor offense.

3. Following those convictions, petitioner was charged with being removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i), which provides for re-

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[4] See U.S. Drug Enforcement Admin., *Benzodiazepines* <http://www.justice.gov/dea/concern/benzodiazepines.html> (noting that "[a]lprazolam" is one of "the two most frequently encountered benzodiazepines on the illicit market" and that "adolescents and young adults" often "take benzodiazepines to obtain a 'high'").

moval of aliens convicted of most drug offenses. Pet. App. 2a. The Notice to Appear identified each of petitioner's state drug possession convictions. *Id.* at 71a; see J.A. 45a-53a.[5] Petitioner admitted the convictions, and the immigration judge (IJ) found him removable as charged. Pet. App. 71a; J.A. 58a, 60a. Petitioner then submitted an application for discretionary cancellation of removal. Administrative Record (A.R.) 527-535; see 8 U.S.C. 1229b(a).

After a hearing, the IJ denied the application on the ground that petitioner's second drug conviction is an "aggravated felony" that makes him ineligible for cancellation of removal. Pet. App. 70a-74a. The IJ relied on this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), which held that the determination whether a state drug offense constitutes an aggravated felony turns on whether the offense is punishable as a felony under federal law, not whether the State classifies the offense as a felony. See *id.* at 55 & n.6, 58-60. The IJ explained that petitioner's second offense is an aggravated felony because it "carries the potential for incarceration of more than a year" under federal law. Pet. App. 72a-73a. The IJ therefore ordered petitioner removed to Mexico. *Id.* at 73a-75a.

4. The Board of Immigration Appeals (Board) affirmed in a divided en banc decision. Pet. App. 11a-69a. The majority stated that, because the question whether petitioner's second conviction for drug possession constituted an "aggravated felony" concerned the interpretation of criminal statutes, the Board would follow precedent (if any) on the issue in the applicable federal court

[5] The Notice to Appear erroneously listed the year of petitioner's second conviction as 2003, J.A. 52a, but the parties understand the Notice to Appear as referring to petitioner's second conviction, see Pet. 6.

of appeals. *Id.* at 17a-18a. The majority observed that the Fifth Circuit had held in the criminal sentencing context that a second state possession conviction qualifies as an "aggravated felony" because that offense could be punished as a felony under federal law. *Id.* at 19a-20a (citing *United States* v. *Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006)). On that basis, the Board dismissed petitioner's appeal. *Id.* at 32a-33a.

Although the issue was not presented in petitioner's case, the Board majority went on to consider the position the Board should adopt in cases arising in federal circuits that had not decided the issue. See Pet. App. 22a-31a. The Board majority decided that in those cases, a second state drug possession conviction would qualify as an aggravated felony only if the alien's "status as a recidivist drug possessor * * * [was] admitted or determined by a court or jury within the prosecution for the second drug crime." *Id.* at 28a. The majority reached that conclusion even though acknowledging that a prior conviction is not an element of the criminal offense but a "sentencing factor[]," *id.* at 23a-24a; that no State "prosecutes recidivist offenses in a manner that exactly parallels the CSA's recidivist requirements," *id.* at 27a; and that some states have no recidivist enhancements for drug offenders at all, *ibid.*

The majority also observed that, under federal law, Section 851 "precludes a Federal judge from enhancing a drug offender's sentence on the basis of recidivism absent compliance with a number of safeguards." Pet. App. 23a. The majority recognized that the procedural steps set forth in Section 851 are not elements of the criminal violation but "procedural safeguards," and that state recidivism procedures will inevitably differ. *Ibid.*

But the majority decided that, in order to qualify as an aggravated felony, the state conviction must have been entered in compliance with state procedures that similarly "provid[ed] the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper." *Id.* at 23a, 27a. In so holding, the majority observed that it was leaving unresolved what other aspects of the Section 851 procedures—including "the timing of notice," the "manner" in which the defendant could challenge the validity of a prior conviction, and the "burdens and standards of proof"—a state court would have to follow. *Id.* at 32a n.10.

Two members of the Board concurred in the dismissal of petitioner's appeal. Pet. App. 33a-69a (Pauley, Board Member, joined by Hurwitz, Acting Vice Chairman). They concluded independent of Fifth Circuit precedent that petitioner's second state conviction for drug possession should qualify as an aggravated felony. *Id.* at 68a-69a. Those Board members reasoned that under *Lopez*, whether an offense is punishable as a felony under the CSA is determined by "examin[ing] the elements of the controlled substance offense as charged by the State and compar[ing] that offense * * * to see whether, if federally prosecuted under such a corresponding statute, the State offense would be a felony." *Id.* at 36a-37a. Under that method of analysis, the two Board members explained, the relevant question is whether a federal prosecutor "presented with the elements of such an offense *could* elect to use 21 U.S.C. § 844(a) * * * to bring a felony prosecution"; "the penalty assigned by the State to the drug offense" and the state procedures followed in prosecuting that offense are "irrelevant." *Id.* at 41a, 57a, 61a.

One other Board member concurred in the judgment, stating that while he believed that Fifth Circuit precedent controlled this case, in the absence of such precedent he would take the analytical approach outlined by the other two concurring Board members. Pet. App. 69a (Hess, Board Member).

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-10a. The court found petitioner's claim that his second state possession conviction did not qualify as an aggravated felony to be foreclosed by *United States* v. *Cepeda-Rios*, 530 F.3d 333, 335-336 (5th Cir. 2008) (per curiam), which reaffirmed after *Lopez* the circuit's earlier holding in *United States* v. *Sanchez-Villalobos*, 412 F.3d 572, 576-577 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006). Pet. App. 6a. Under *Sanchez-Villalobos*, the court explained, a second possession conviction for conduct that "could have been punished as a felony under federal law qualifie[s] as an aggravated felony." *Ibid.* The court found that approach consistent with the *Lopez* Court's explanation that because "federal law should control" whether the offense conduct qualifies as an aggravated felony, *id.* at 8a-9a, a state offense is an aggravated felony if it "proscribes conduct punishable as a felony under th[e] [CSA]," *id.* at 5a (quoting *Lopez*, 549 U.S. at 60).

6. After certiorari was granted, Immigration and Customs Enforcement reported the following information to this Office: In January 2008—about one month after the Board's decision in this case—petitioner was removed from the United States. On March 1, 2008, petitioner reentered the United States illegally. In August 2008, petitioner was convicted of a third drug possession offense in Texas state court, for possessing two ounces or less of marijuana, and was sentenced to 6 days

of imprisonment. See *State* v. *Rosendo*, No. 1546660 (County Crim. Ct. No. 7, Harris County, Tex. Aug. 28, 2008). Petitioner's removal order was reinstated under 8 U.S.C. 1231(a)(5), and he was again removed from the United States.

SUMMARY OF ARGUMENT

Petitioner's second drug possession offense qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B) because that offense is "punishable" as a "felony" under the federal Controlled Substances Act. Accordingly, petitioner's second drug possession conviction renders him ineligible for cancellation of removal under 8 U.S.C. 1229b(a)(3).

A. Under the text of 8 U.S.C. 1229b(a)(3), 8 U.S.C. 1101(a)(43)(B), and 18 U.S.C. 924(c)(2), an alien who is "convicted" of an offense that is "punishable" as a felony under the CSA is ineligible for cancellation of removal. That is true here. In 2005, petitioner was convicted of drug possession in Texas state court. Drug possession is a federal offense under the CSA. How that offense is punishable depends on the offender's criminal history. Here, because petitioner committed his 2005 drug offense after his 2004 conviction for drug possession had become final, he could have been punished by up to two years of imprisonment under the CSA. Petitioner's second drug offense thus was "punishable" as a felony under the CSA, and qualifies as an aggravated felony.

That conclusion follows from *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), which also considered whether a state drug offense was an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B). The Court explained that, in hinging the application of that statutory provision on how an offense is "punishable" under federal law, Congress made the

immigration consequences of a state conviction turn on how Congress viewed the seriousness of the offense, rather than how the State punished the offense.

B. Petitioner makes two arguments for why his offense does not qualify as an aggravated felony, neither of which is correct.

First, petitioner contends that his offense is not an aggravated felony because the state court did not establish that he was a recidivist in convicting him of drug possession. But under the terms of 8 U.S.C. 1101(a)(43)(B), no such state-court finding is necessary. If the elements of the offense established in state court correspond to the elements of a federal drug possession offense, and the offense is a second or subsequent such offense, then it is "punishable" as a felony under the federal CSA. That is precisely the approach this Court outlined in *Lopez*. It also is consistent with this Court's decisions in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), and *United States* v. *Hayes*, 129 S. Ct. 1079 (2009), in which the Court rejected the view that the word "convicted" requires that every fact relevant to categorization of an offense must be established in the underlying state conviction. And that approach is supported by *United States* v. *Rodriquez*, 128 S. Ct. 1783 (2008), which explained the important distinction between offense elements and sentencing factors, and confirmed that a prior conviction is a sentencing factor, relevant to how an offense is "punishable" for a given offender. By ignoring the fundamental distinction between offense elements and sentencing factors, petitioner turns the definition of "aggravated felony" on its head, making it depend on how an offender actually was punished in state court, rather than, as the statute specifies, on how

the offense was "punishable" as a general matter under federal law.

Second, petitioner contends that an offense is "punishable" as a felony in federal court only if the state court followed procedures like those required for imposing a recidivist enhancement in federal court. But this argument fails for much the same reason. Whether an offense is an aggravated felony depends on how it could be punished in federal court, not how it actually was punished in state court. The procedures contained in 21 U.S.C. 851 do not apply on their own terms in state court, and the relevant federal statutory provisions offer no basis to require that States follow similar procedures before an offense can be considered "punishable" as a felony in federal court. No State has procedures identical to those in Section 851, and the procedures for convicting and sentencing a defendant vary widely both among the States and between state and federal court.

C. Treatment of a second or subsequent drug possession as an aggravated felony furthers Congress's important purposes. Congress enacted the "aggravated felony" provision of the INA to address the serious threat to public safety and the significant costs imposed on society by criminal aliens in the United States. Section 1101(a)(43)(B) reflects Congress's judgment that an alien who commits serious drug offenses should not be allowed to remain in the United States. Congress has long viewed recidivist possession as a serious drug offense.

D. Petitioner's position should be rejected because it would unnaturally constrict the statute's scope and result in a patchwork application of federal immigration law. Aliens who committed the exact same offense conduct—repeatedly possessing drugs—would be subject to

different federal immigration consequences based on state sentencing schemes and procedures. As this Court recognized in *Lopez*, the statutory design makes plain that Congress intended uniform treatment of aliens based on how their offenses could be punished in federal court.

Petitioner contends that he should escape classification as an aggravated felon because Texas law did not permit a sentence enhancement in his second drug case. But what matters is Congress's judgment about the seriousness of a second drug possession offense, and Congress has long viewed recidivist possession as an offense warranting felony punishment.

E. There is no need to resort to any canon of construction to resolve this case. The rule of criminal lenity comes into play only if, after the Court has employed every tool of statutory interpretation at its disposal, a grievous ambiguity remains. No such ambiguity exists in this case. The statute's reference to how an offense is "punishable" under the federal CSA, read in light of this Court's decisions in *Lopez*, *Nijhawan*, *Hayes*, and *Rodriquez*, makes plain that what matters is the potential federal treatment of a second possession offense, not the actual state treatment. The judgment of the court of appeals should be affirmed.

ARGUMENT

PETITIONER'S SECOND DRUG POSSESSION CONVICTION IS A CONVICTION FOR AN "AGGRAVATED FELONY" UNDER 8 U.S.C. 1101(a)(43)(B)

Under 8 U.S.C. 1229b(a)(3), an alien is ineligible for cancellation of removal if he has been convicted of any aggravated felony. As relevant here, Congress defined an "aggravated felony" to encompass any "felony pun-

ishable under the Controlled Substances Act." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c). A person who commits a drug possession offense after a conviction for a prior drug offense has become final is punishable as a felon under the federal CSA. 21 U.S.C. 844(a). Petitioner acknowledges that he has been convicted of two drug possession offenses, the second of which he committed after the first conviction became final. But he says that because the state court did not actually sentence him as a recidivist or employ procedures like those used to do so in federal court, his second offense should not count as an aggravated felony. Petitioner is wrong.

A. Under The Statutory Text and *Lopez*, A Second Drug Possession Offense Is An "Aggravated Felony" Because It Is "Punishable" As A Felony Under The Controlled Substances Act

As in any case of statutory construction, the analysis "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (internal quotation marks omitted). Here, the language Congress chose makes clear that any offense that could have been punished as a felony under the federal CSA is an aggravated felony, regardless of how that offense was actually punished.

1. To be eligible for cancellation of removal, an alien must demonstrate, *inter alia*, that he "has not been convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3). Congress defined the term "aggravated felony" by reference to a list of categories of qualifying criminal offenses. Any offense "described in" that list, "whether in violation of Federal or State law," is an aggravated

felony. 8 U.S.C. 1101(a)(43) (penultimate sentence).[6] As relevant here, the list includes "illicit trafficking in a controlled substance * * *, including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Section 924(c)(2) in turn defines a "drug trafficking crime" to "mean[] any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)" or two other statutes. 18 U.S.C. 924(c)(2). A crime is punishable as a "felony" if the "maximum term of imprisonment authorized" is "more than one year." 18 U.S.C. 3559(a); see also *Lopez* v. *Gonzales*, 549 U.S. 47, 54 n.4 (2006). Thus, an offense that is "punishable" by more than one year of imprisonment under the CSA qualifies as an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B).

The statutory text makes plain Congress's view that whether a drug crime qualifies as an aggravated felony depends on the punishment that could be imposed if the drug crime were prosecuted under federal law. That much is apparent from the key term "punishable." "Punishable" means "deserving of, or liable to, punishment" or "capable of being punished by law." *Webster's Third New International Dictionary of the English Language* 1843 (1993); see also *Black's Law Dictionary* 1269 (8th ed. 2004) (*Black's*) (a crime need only "giv[e] rise to a specified punishment," and a person need only be "subject to a punishment," to be "punishable"). This Court has considered the word "punishable" on numerous occasions, and it has understood that word to signal a potential—not actual—punishment. See, *e.g.*, *Burgess* v. *United States*, 128 S. Ct. 1572, 1576-1577 & n.2 (2008)

[6] In some circumstances, offenses in violation of "the law of a foreign country" also qualify as aggravated felonies. 8 U.S.C. 1101(a)(43) (penultimate sentence).

("punishable by imprisonment for more than one year" refers to potential punishment of more than one year) (quoting 21 U.S.C. 802(44)); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 482-483 & n.3, 488 (1985) ("punishable under any law of the United States" does not require actual punishment). Thus, if the offense conduct would be subject to a sentence of more than one year under federal law, then that offense is "punishable" as a felony under the CSA.

2. This Court has previously construed the statutory language at issue in precisely that manner. In *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), the Court addressed whether the language "felony punishable under the [CSA]" includes an offense that was punished as a felony under state law but could only be punished as a misdemeanor under the CSA. *Id.* at 50, 53-60. The Court concluded that such an offense is not an aggravated felony and therefore did not render the petitioner ineligible for cancellation of removal. See *id.* at 51-52. "[A] state offense constitutes a 'felony punishable under the Controlled Substances Act,'" the Court concluded, "only if it proscribes conduct punishable as a felony under that federal law." *Id.* at 60.

The Court thus held in *Lopez* that the touchstone for determining whether an offense is an aggravated felony is how it could be punished under federal law. The Court explained: "[I]f we want to know what felonies might qualify" as aggravated felonies, "the place to go is to the definitions of certain crimes punishable as felonies under the CSA." 549 U.S. at 55. The Court then provided guidance for that assessment. A judge should compare the state offense to possible federal offenses, and "a state offense whose elements include the elements of a felony punishable under the CSA is an aggra-

vated felony." *Id.* at 57. Put another way, the Court stated, if the state offense "proscribes conduct" that may be punished as a felony under the CSA, that offense qualifies as an aggravated felony. *Id.* at 60.

The Court emphasized that Congress did not intend the determination of what counts as a qualifying drug trafficking offense to vary with state criminal classifications. Congress instead intended the determination to be based on "the classifications Congress itself chose." *Lopez*, 549 U.S. at 58. The Court determined that "it is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers," *id.* at 59; see *id.* at 58, 60, or "that Congress was courting any such state-by-state disparity," *id.* at 59.

3. Applying the statutory text and the *Lopez* framework to the circumstances of this case, petitioner is ineligible for cancellation of removal because his second state possession offense is punishable as a felony under the CSA.

a. Texas law criminalizes drug possession. Six different drug possession offenses are defined based on the type of drugs involved.[7] Petitioner was convicted of two such offenses in state court. Pet. App. 2a; J.A. 16a-27a (first offense in 2004), 28a-39a (second offense in 2005). The offense at issue here is his second one, under Tex. Health & Safety Code Ann. § 481.117(a) (Vernon 2003), which makes it a crime to "knowingly or intentionally possess[] a controlled substance listed in Penalty Group

[7] See Tex. Health & Safety Code Ann. § 481.115 (Vernon 2003) (possession of substance in Penalty Group 1); *id.* § 481.1151 (Penalty Group 1-A); *id.* § 481.116 (Penalty Group 2); *id.* § 481.117 (Penalty Group 3); *id.* § 481.118 (Penalty Group 4); *id.* § 481.121 (marijuana).

3" without a prescription or doctor's order. See *id.* § 481.104(a)(2) (alprazolam is in Penalty Group 3). Although petitioner was a repeat drug offender, he could not be sentenced as a recidivist under Texas law. That is because petitioner's second offense was a Class A misdemeanor, and an enhanced sentence is available for a Class A misdemeanor only if the offender previously was convicted of a Class A misdemeanor or a felony. Tex. Penal Code Ann. § 12.43(a) (Vernon 2003). Petitioner's first offense—possession of two ounces or less of marijuana—was a Class B misdemeanor. See p. 6, *supra*.

b. As this Court explained in *Lopez*, what matters is not how petitioner was charged and sentenced in state court, but how his second offense could have been punished in federal court.

The CSA makes it unlawful "for any person knowingly or intentionally to possess a controlled substance" without a prescription or other legal authorization under the CSA. 21 U.S.C. 844(a). For most drugs, a first offense is punishable by up to one year of imprisonment, *ibid.*—*i.e.*, punishable as a misdemeanor, 18 U.S.C. 3559(a)(6).[8] But a second or subsequent drug offense may be punished more severely. If a person "commits [a Section 844(a)] offense after a prior [federal drug] conviction * * * or a prior conviction for any drug, narcotic or chemical offense chargeable under the law of any State[] has become final," that second offense is punishable by up to two years of imprisonment, 21 U.S.C. 844(a)—*i.e.*, punishable as a felony, 18 U.S.C. 3559(a)(5).

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[8] That is not universally the case. See note 2, *supra* (noting first possession offenses that are punishable as felonies).

In order for the felony sentence authorized by Section 844(a) to be imposed on a recidivist possessor of controlled substances, certain procedures (set out in 21 U.S.C. 851) must be followed. The government must give notice, by way of an information, of the prior conviction on which the government intends to rely. 21 U.S.C. 851(a)(1). Before sentencing, the court must give the defendant the opportunity to contest the allegations concerning the prior conviction, and the court, sitting without a jury, imposes sentence. 21 U.S.C. 851(b) and (c)(1). Section 851 sets out a variety of other procedural rules, relating to such matters as the burden of proof. 21 U.S.C. 851(c)(1) and (2). The section also provides that the defendant may not challenge the validity of a conviction that occurred more than five years earlier. 21 U.S.C. 851(e). But contrary to petitioner's contention (Br. 34), none of those procedural steps is a "precondition[] to a conviction under" Section 844(a); rather, they are prerequisites to being "sentenced to increased punishment" for the crime of which the defendant has been convicted. 21 U.S.C. 851(a)(1).

c. If petitioner's second drug offense had been prosecuted under federal law, it could have been punished as a felony. Section 844(a) requires proof of knowing, unauthorized possession of a controlled substance. See 21 U.S.C. 844(a); see also, *e.g.*, *United States* v. *Lacy*, 446 F.3d 448, 454 (3d Cir.), cert. denied, 549 U.S. 1013 (2006). Petitioner's second state conviction established each of those elements. Tex. Health & Safety Code Ann. § 481.117(a) (Vernon 2003); see, *e.g.*, *Batiste* v. *State*, 217 S.W.3d 74, 79 (Tex. App. 2006); see also 21 U.S.C. 802(6), 812(b)(4); 21 C.F.R. 1308.14(c)(1) (alprazolam is a controlled substance under the CSA). Further, for petitioner, a sentence of up to two years would have been

appropriate. Petitioner's first conviction was for a "drug, narcotic, or chemical offense" because it was in violation of a law prohibiting possession of a substance that cannot be possessed legally under the CSA. 21 U.S.C. 844(c); see 21 U.S.C. 812(c) (Schedule I, para. (c)(10)), 844(a) (prohibiting possession of marijuana). And petitioner's first conviction had become final at the time he committed his second offense. J.A. 28a-30a; see Tex. R. App. P. 26.2(a). Petitioner's second offense was therefore an "aggravated felony" for immigration purposes.

Indeed, this Court in *Lopez* understood the statutory scheme to apply to a second drug possession offense in exactly this way. The Court observed that although the term "drug trafficking crime" may not appear on its face to include drug possession offenses, Congress included certain possession offenses by defining the phrase to encompass any "felony punishable under the [CSA]," 18 U.S.C. 924(c)(2):

> Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2), such as possession of cocaine base and *recidivist possession*, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2).

549 U.S. at 55 n.6 (emphasis added); see also *id.* at 54 n.4; *id.* at 64 (Thomas, J., dissenting).[9] That conclusion

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[9] Relying on *Lopez*, petitioner contends (Br. 17-18) that a "clear statutory command" is required to find that a second possession offense qualifies as an aggravated felony. But the *Lopez* Court found that such a clear statutory command exists with respect to recidivist possession. The Court observed that "Congress did counterintuitively define some possession offenses as 'illicit trafficking'"—including "recidivist posses-

follows directly from the Court's approach, which treated as critical Congress's (rather than any State's) judgment about the seriousness of an offense, see *id.* at 58-59, and therefore focused on how the conduct established through the state conviction could be punished under federal law, see *id.* at 55, 60.

4. Petitioner does not dispute that he was convicted of two drug possession offenses. He also does not dispute that his second drug offense could have been prosecuted under federal, rather than state law. And petitioner cannot dispute that an enhanced felony penalty would have been available in federal court because of his recidivism. For those reasons, the offense for which petitioner was "convicted" in 2005 was "punishable" as a felony under the CSA.

B. Whether An Offense Is "Punishable" As A Federal Felony Does Not Depend On Whether The State Court Actually Sentenced The Offender As A Recidivist Or Followed Certain Procedures

Petitioner makes essentially two arguments for why his second offense is not "punishable" as a felony under the CSA. First, he observes that he is ineligible for discretionary cancellation of removal only if he has been "convicted" of an aggravated felony, see 8 U.S.C. 1229b(a)(3), and he argues that the word "convicted" means that all facts included in the aggravated felony definition—including the fact of his prior offense—must have been established in the state proceeding. Pet. Br. 17-29. Second, he contends that a second state drug possession offense is "punishable" as a felony only if proce-

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sion"—and it stated that a "clear statutory command" would be required before the statute would be "read[] * * * to cover *other*[]" possession offenses. 549 U.S. 55 n.6 (emphasis added).

dures like those in 21 U.S.C. 851 have been followed in state court. Pet. Br. 29-34. Neither argument is correct.

1. Petitioner argues that he has not been "convicted" of an aggravated felony because the state court convicted him of "simple possession," not "recidivist possession." Pet. Br. 18-24. In petitioner's view, unless the state court in the second proceeding established his prior conviction, that conviction cannot be considered in deciding how his offense would be "punishable" under federal law. *Id.* at 24 & n.3 (contending that the word "conviction" means that an IJ "must look solely to conduct found by the convicting court"). Petitioner is mistaken.

The requirement in the INA's cancellation-of-removal provision, 8 U.S.C. 1229b(a)(3), that an alien show that he has not been "convicted" of an aggravated felony itself says nothing about whether his offense of conviction is an aggravated felony. Under the INA, a "conviction" is a "formal judgment of guilt" (8 U.S.C. 1101(a)(48)) that occurs when all elements of the crime have been established beyond a reasonable doubt. See, *e.g.*, *Fiore* v. *White*, 531 U.S. 225, 228-229 (2001) (per curiam); *Richardson* v. *United States*, 526 U.S. 813, 817 (1999); see also, *e.g.*, *Black's* 559 (defining "elements of crime" as "[t]he constituent parts of a crime * * * that the prosecution must prove to sustain a conviction"). Thus, the state offense of conviction is defined solely by the elements of the offense. Here, as explained above, petitioner's second conviction established all the elements necessary to make out a drug possession offense under Section 844(a). See p. 20, *supra*.

The word "punishable" incorporated into the INA's definition of "aggravated felony" from 18 U.S.C.

924(c)(2) then requires consideration of how the offender could be punished for that offense under federal law. Here, because of an additional fact—that petitioner committed the offense after a prior drug offense had become final—he could be punished as a felon under the federal CSA. 21 U.S.C. 844(a). Contrary to petitioner's contention (Br. 24), that additional fact need not be established in the state court proceeding. The term "punishable" directs an IJ to look beyond the elements of the offense to criminal history. In the CSA, a prior conviction is the predicate for an enhanced sentence, not an element of the offense. See *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1788 (2008) ("[P]rior convictions required for recidivist enhancements are not typically offense elements."); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 244 (1998) ("Congress * * * has never, to our knowledge, made a defendant's recidivism an element of an offense where the conduct proscribed is otherwise unlawful."). Thus, a prior conviction may be considered in determining how an offense is "punishable," even if it was not considered by the state court in actually punishing the offense.[10]

Petitioner's view reads the word "punishable" out of the definition of "aggravated felony." See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009) (the Court is "obliged to give effect, if possible, to every word Congress used" (internal quotation marks omitted)). By

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[10] Petitioner's observation (Br. 24-25) that a state conviction for drug possession would not correspond to a federal offense of possession with intent to distribute under 21 U.S.C. 841 is accurate, but perfectly consistent with this approach. Intent to distribute the drugs is a necessary element of the federal offense, see, *e.g.*, *United States* v. *Iglesias*, 535 F.3d 150, 156 (3d Cir. 2008), cert. denied, 129 S. Ct. 2813 (2009), which would not have been established by the state conviction.

making the definition of "aggravated felony" turn on how an offender *actually was punished* in state court, petitioner ignores Congress's direction that what matters is whether an offense is "punishable"—*i.e.*, *could be punished*—as a felony in federal court.

Petitioner's only response (Br. 28) is that the distinction between offense elements and sentencing predicates is relevant only for "constitutional purposes," and not for purposes of determining whether an offense is an aggravated felony under the statute. But that is incorrect. This Court has distinguished between offense elements and other facts in numerous decisions, including *Nijhawan*, *Hayes*, and *Rodriquez*, all of which involved statutory interpretation rather than constitutional issues. See pp. 26-31, *infra*. Indeed, *Nijhawan* involved the same question as here—whether an alien had been "convicted" of a particular "aggravated felony." See pp. 26-28, *infra*.[11]

In *Lopez* as well, the Court considered whether an alien had been convicted of the "aggravated felony" defined in 8 U.S.C. 1101(a)(43)(B), and therefore was ineligible for cancellation of removal. 549 U.S. at 51-52. The Court explained that if the conduct for which the person was convicted—as defined by the elements of the state offense—can be punished as a felony under the CSA, the offense is an aggravated felony. *Id.* at 57.

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[11] Petitioner argues in the alternative (Br. 29) that if the word "convicted" defines the elements of the offense, then "*no* conviction for simple possession could count as an aggravated felony because the *elements* of simple possession never make it a felony." But that is mistaken because, as explained above, a statutory sentencing prerequisite (made relevant because of the word "punishable"), rather than offense elements, is what makes a second possession offense punishable as a felony in federal court.

The *Lopez* Court never suggested that the word "convicted" in the INA's cancellation-of-removal provision somehow modifies or narrows the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43)(B). Instead, the Court emphasized the importance of basing the "aggravated felony" determination on Congress's judgment about the seriousness of the offense, reflected in how the offense is "punishable" in federal court. 549 U.S. at 55-58. Petitioner's use of "conviction" to negate the effect of the word "punishable" in the definition of "aggravated felony" would make the meaning of that term depend on varying state classifications, rather than on Congress's judgment—directly contrary to this Court's holding. See *id.* at 58-60.

2. In addition to *Lopez*, this Court's decisions in *Nijhawan*, *Hayes*, and *Rodriquez* confirm that the word "convicted" in 8 U.S.C. 1229b(a)(3) does not limit the term "aggravated felony," and that only offense elements need be established in the underlying conviction.

a. This Court has already considered—and rejected—petitioner's argument that all facts relevant to whether an offense counts as an aggravated felony must be established in the state proceeding. In *Nijhawan*, the Court addressed the same question at issue here—whether an alien was "convicted" of an "aggravated felony." The aggravated felony at issue was defined as "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i), and the question before the Court was whether the fact of a $10,000 loss must be established as an element of the offense of conviction, 129 S. Ct. at 2297. The Court held that the loss amount need not be established as an element of the fraud or deceit crime. *Id.* at 2302.

In so holding, the Court necessarily rejected the view that the word "convicted" requires every fact in the definition of "aggravated felony" to have been established in the state court proceeding. The petitioner there argued that the word "convicted" in 8 U.S.C. 1227(a)(2)(A)(iii)—which makes an alien convicted of an aggravated felony removable—requires that all of the facts in the definition of "aggravated felony" be established by the state court. Pet. Br. at 22-26, *Nijhawan*, *supra* (No. 08-495). By contrast, the government argued that the requirement of a "conviction" does not mean that "all of the qualifying criteria mentioned in the 'aggravated felony' definition[] * * * must be elements of the relevant offense," Gov't Br. 17-18, *Nijhawan*, *supra* (No. 08-495). The Court's holding endorsed the government's approach by concluding that the petitioner had been "convicted" of the "aggravated felony" at issue, even though the loss amount had not been proved to the jury. *Nijhawan*, 129 S. Ct. at 2301-2302.

The *Nijhawan* Court explained that the phrase "in which the loss to the victim or victims exceeds $10,000" "refers to the specific circumstances in which a crime was committed" but does not help to define the crime itself. 129 S. Ct. at 2301-2302. The same is true here: a drug possession offense may be punished as a felony based on the circumstances in which the crime was committed—*i.e.*, if it was "commit[ted] * * * after a prior conviction" for a state or federal drug offense "has become final." 21 U.S.C. 844(a). And in this context, Congress's reference to how a crime is "punishable" underscores the need to look to federal sentencing criteria that are not part of the offense of conviction.

Petitioner contends (Br. 26 n.4) that this case is different from *Nijhawan* because "[t]he need for a finding

of fraud or deceit [under 8 U.S.C. 1101(a)(43)(M)(i)] * * * mirrors the need for a finding of recidivism." But those two facts differ markedly, because fraud or deceit is an element that defines the offense at issue in *Nijhawan*, see 129 S. Ct. at 2298 (referring to the "fraud or deceit crime"); *id.* at 2302 (same); and *id.* at 2298 (loss threshold "does not refer to an element of the fraud or deceit crime"), while a defendant's prior conviction is a sentencing predicate, see *Almendarez-Torres*, 523 U.S. at 244. A finding of a final prior conviction is required for felony punishment, but not for conviction of a drug possession offense under Section 844. The Court's holding in *Nijhawan* cannot be reconciled with petitioner's contention that the word "convicted" in 8 U.S.C. 1229b(a)(3) requires every fact in the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43) to have been established in the state court proceeding.[12]

b. The Court's decision in *Hayes* likewise rejected the broad view of "conviction" espoused by petitioner. That case addressed whether 18 U.S.C. 922(g)(9), which bars firearm possession by a person previously "convicted" of a "misdemeanor crime of domestic violence,"

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[12] Petitioner suggests in passing (Br. 25-26) that the categorical approach developed in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), for assessing whether to apply a criminal sentencing enhancement based on a generic crime, applies here. Even assuming that the same categorical approach must apply in the immigration context, the portion of 8 U.S.C. 1101(a)(43)(B) at issue here does not refer to a "generic crime," but instead to a specific definition in 18 U.S.C. 924(c). In any event, the categorical approach focuses on whether the generic crime and the predicate crime have the same offense elements, which is essentially the inquiry the government advocates here; a sentencing factor such as recidivism is not an element that would need to be present under the categorical approach.

required that the domestic relationship be established as an element of the underlying offense. 129 S. Ct. at 1082. After reviewing the statutory text, the Court determined that Congress did not intend to require the domestic relationship to have been established as an element in the underlying state proceeding; that relationship could instead be established in the later federal proceeding for firearm possession. *Id.* at 1084-1089. In so holding, the Court distinguished between facts that Congress intended to have been established as elements of the underlying offense (such as the use of force) and facts that may be established in the subsequent proceeding (such as the domestic relationship). *Id.* at 1084-1085. That distinction applies here: the facts that make a drug offense "punishable" as a felony need not have been established in the prior state court proceeding, but only in the later immigration proceeding.

c. This Court's recent decision in *Rodriquez* also underscores the distinction between offense elements and sentencing factors in determining the effect of an offender's prior conviction on the sentence for his second offense. At issue in *Rodriquez* was a provision of the Armed Career Criminal Act of 1984 that sets a 15-year minimum sentence for a person who has "three previous convictions" for a violent felony or serious drug offense, where a "serious drug offense" includes a state drug offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 128 S. Ct. at 1787 (quoting 18 U.S.C. 924(e)(1) and (2)(A)). The question before the Court was whether the "maximum term of imprisonment for the offense" is the maximum punishment for a first-time offender or for the respondent in that case, who was a recidivist offender. *Ibid.*

The Court concluded that the "maximum term of imprisonment" for a repeat offender is the maximum term prescribed by law for recidivists. *Rodriquez*, 128 S. Ct. at 1787-1788. That is because the term "maximum term of imprisonment"—just like the word "punishable" here—refers to the potential punishment that a particular offender would face. *Ibid.* The Court rejected the view that the "maximum term" was limited to the punishment available for simply committing the elements of the offense, divorced of any additional facts. *Id.* at 1788. In reaching that conclusion, the Court recognized that the punishment available for an offense requires consideration not only of the offense elements but also of sentencing factors such as prior offenses. The same is true here: to determine how an offense is "punishable" under the CSA, a court must look beyond the offense elements to sentencing factors relevant to the particular offender. In this case, petitioner's prior conviction exposes him to an enhanced punishment under the CSA.

Petitioner's approach cannot be squared with *Nijhawan*, *Hayes*, and *Rodriquez*. *Nijhawan* and *Hayes* establish that the word "convicted," standing alone, does not define or limit the phrase "aggravated felony." In each of those cases—as here—there was indisputably a "conviction" for an offense; the question was whether the offense qualified as an "aggravated felony" (in *Nijhawan*) or a "misdemeanor crime of domestic violence" (in *Hayes*). If the elements of the state offense corresponded to the elements of the federal offense, and the required additional facts (the amount of loss in *Nijhawan*, the domestic relationship in *Hayes*) were present, then the offense qualified; the additional facts did not need to be established in the prior proceeding. *Rodriquez* confirms the validity of that approach. It explains

that even though sentencing factors are not established as part of the underlying conviction, they are relevant to the maximum punishment available for an offense. In light of these decisions, petitioner is mistaken in contending that the distinction between offense elements and sentencing factors is irrelevant to the question presented here.

3. Petitioner also argues (Br. 29-34) that because Section 851 procedures must be followed for felony punishment to be imposed in federal court, an offense is only "punishable" as a federal felony if the state court followed those same procedures. That is incorrect.

a. Whether a drug offense is an "aggravated felony" depends on whether it is "punishable" as a felony in federal court (*i.e.*, on whether the sentence imposed there could be more than one year), not on how the offense actually was punished in state court. See pp. 16-18, *supra*; *Lopez*, 549 U.S. at 59-60. A court need look no further than 21 U.S.C. 844(a) to ascertain the maximum punishment that an alien would face in federal court for a second drug possession offense.

By contrast, Section 851 does not state factors relevant to the maximum possible sentence for an offense. That provision defines *procedures* that must be followed for "[i]mposition of sentence" on a "person who stands convicted of an offense under [21 U.S.C. 841-865]," 21 U.S.C. 851(d) and (e)—*i.e.*, after the elements of the offense have already been found. See *United States* v. *Severino*, 316 F.3d 939, 943 (9th Cir.) (en banc) ("Section 851 is a procedural statute; the facts and the law either exist to enhance defendant's sentence or they don't—section 851(a) doesn't change that."), cert. denied, 540 U.S. 827 (2003). By requiring that these or similar procedures be followed in state court, petitioner's view

makes critical the manner of imposing the sentence in state court, not the possible term of imprisonment available in federal court.[13] But the statutory text requires a "felony *punishable* under" the CSA, not a "felony that was punished under" the CSA or was punished following procedures like those in the CSA. If Congress had intended the unusual meaning petitioner claims, it could be expected to have said so.

b. Aside from its lack of textual basis, petitioner's approach is unworkable. Petitioner would determine whether a state offense may qualify as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B) by reference to a statute (Section 851) that has no application in state court and that sets out numerous detailed procedural requirements. The Section 851 procedures address the specific format for informing a defendant of a potential sentence enhancement, 21 U.S.C. 851(a)(1); the time for filing the information, 21 U.S.C. 851(a); the method by which the defendant may challenge the proposed enhancement, 21 U.S.C. 851(c)(1); the timing for such a challenge, 21 U.S.C. 851(b); the impact of a failure to file a timely challenge, 21 U.S.C. 851(b), (c)(2) and (d)(1); the procedures for the hearing on whether an enhancement is warranted, 21 U.S.C. 851(c)(1); the burdens of proof in that proceeding, 21 U.S.C. 851(c)(1) and (2); and the rights of the government to challenge a decision not to enhance a sentence, 21 U.S.C. 851(d)(2). Section 851

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[13] The Court's decision in *United States* v. *LaBonte*, 520 U.S. 751 (1997), cited by petitioner (Br. 34), is consistent with the government's view. The statute at issue there, 28 U.S.C. 994(h), gave direction to the Sentencing Commission about the circumstances in which the Guidelines should recommend a higher sentence for recidivists, see 520 U.S. at 753, as opposed to a judgment about the maximum term by which an offense is "punishable."

also provides a statute of limitations: a person may not challenge the validity of a prior conviction that is more than five years old. 21 U.S.C. 851(e).

Petitioner does not argue that every aspect of these procedures must be followed before a state conviction can count as an "aggravated felony" under Section 1101(a)(43)(B). But that is the logical implication of his position, which is that a second drug offense is "punishable" as a felony only if procedures like those in Section 851 are followed in state court. Pet. Br. 29-30. On that view, for a state offense to count as an aggravated felony, the State not only would have to provide the defendant with notice of and an opportunity to challenge his prior conviction, but also would have to use the same type of notice and the same time limitations as in Section 851, allocate the burdens of proof as in Section 851, and follow all the other procedures Section 851 prescribes. See Pet. App. 32a n.10. That approach would largely nullify Congress's determination that state crimes may qualify as "aggravated felon[ies]" by virtue of recidivism. Cf. *Hayes*, 129 S. Ct. at 1084-1089. Petitioner does not identify *any* State with sentencing procedures identical to those in Section 851; and although the Board requested supplemental briefing on that issue below, it also was unable to identify any State that utilizes such procedures. Pet. App. 27a. And requiring immigration judges to sort through varying state procedures (on which they have no expertise) to determine which are sufficiently similar to those in Section 851 would complicate and protract immigration proceedings.

Moreover, petitioner's argument logically would go beyond even all the procedures specified in Section 851. Unanimous verdicts are required in federal court, see Fed. R. Crim P. 31(a), but not in some state courts, *e.g.*,

Johnson v. *Louisiana*, 406 U.S. 356, 362 (1972). Petitioner's argument therefore suggests that a state drug possession offense cannot count as "punishable" as a federal felony unless the offender was convicted by unanimous verdict. And the unanimous verdict requirement is only one of many procedural requirements that apply in federal court but not in some state courts. See Pet. App. 55a (Pauley, Board Member, concurring) (listing differences between state and federal procedure). There is no reason to think that Congress intended treatment of an offense for federal immigration purposes to depend upon a state's decision to adopt federal criminal and sentencing procedures.

4. Petitioner suggests (Br. 26-27) that an interpretive anomaly would result from the government's reading of the statute. The illegal reentry statute provides that an alien whose removal followed "a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)," may be sentenced to up to 10 years of imprisonment, 8 U.S.C. 1326(b)(1), while an alien whose removal followed "a conviction for commission of an aggravated felony" may be sentenced to up to 20 years of imprisonment, 8 U.S.C. 1326(b)(2). Petitioner argues (Br. 27) that because the government considers a second drug possession offense to be an "aggravated felony," Section 1326(b)(1)'s reference to "three or more misdemeanors involving drugs" would have limited application.

Petitioner is mistaken. As an initial matter, Congress enacted the portion of Section 1326 referring to three misdemeanors in 1994, well after the aggravated felony definition at issue here, and it therefore cannot be read to modify or constrict the definition of "aggravated

felony" in 8 U.S.C. 1101(a)(43)(B). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 2023; see also, *e.g.*, *United States* v. *Garcia-Olmedo*, 112 F.3d 399, 401 n.4 (9th Cir. 1997), abrogated on other grounds by *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc).

And in any event, the government's position would not vitiate Section 1326(b)(1). By quoting only a portion of Section 1326(b)(1), petitioner fails to acknowledge that none of the three misdemeanors referred to there need be drug-related: that provision could apply to three "crimes against the person" or to a combination of drug crimes and crimes against the person. Even assuming a situation in which at least two of the three misdemeanors "involv[ed] drugs," the provision would retain meaning. For example, three drug possession misdemeanors would not qualify as an aggravated felony if the offenses concerned substances that are illegal under state law but not listed as controlled substances under the CSA. *Ibid.*; see also, *e.g.*, *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072, 1078 & n.6 (9th Cir. 2007) (discussing substances regulated by California's narcotics laws but not by the CSA). And if an alien committed three drug possession offenses in succession, each before the last became final, neither his second nor third offense would qualify as an aggravated felony. See 21 U.S.C. 844(a); see also *United States* v. *Castro-Coello*, 474 F. Supp. 2d 853, 864 (S.D. Tex.), aff'd, 234 Fed. Appx. 319 (5th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 1472 (2008).

Moreover, the term "misdemeanors involving drugs" is not limited to possession crimes but would apply to any state misdemeanor drug crimes, including those crimes, such as solicitation, not covered by the CSA.

See, *e.g.*, Cal. Health & Safety Code § 11360(b) (West 2007); *United States* v. *Rivera-Sanchez*, 247 F.3d 905, 908-909 (9th Cir. 2001) (en banc) (noting that California law prohibits solicitation, which is not prohibited by the CSA). Accordingly, Section 1326(b)(1) would have numerous applications under the government's position.

Petitioner also observes (Br. 22) that if an offense need only be "punishable" as a felony, then a second federal possession offense would count as an aggravated felony even if the prosecutor did not seek an enhanced sentence for that offense. That is true, but hardly anomalous. Such a result would appropriately reflect Congress's judgment that—regardless how a second possession offense in fact is punished—it is serious enough to warrant denial of immigration benefits. See pp. 38-42, *infra*. In effect, Congress decided that two aliens who were convicted of the same serious drug-related conduct should be treated the same way for immigration purposes, even if one but not the other receives an enhanced sentence. Whether the second offense is prosecuted in state or federal court, the Section 851 procedures need not be followed for the offense to be "punishable" as a felony and thus qualify as an aggravated felony.

5. Petitioner's reading of the terms "convicted" and "punishable" would create substantial uncertainties and anomalies in the aggravated felony provisions of the INA.

The "aggravated felony" definition at issue here appears in a list of serious offenses for which Congress specified certain immigration consequences. A "conviction" for any one of these offenses makes an alien ineligible for certain immigration benefits. Under petitioner's view, "the term 'conviction' * * * limits the IJ to the conduct adjudicated by the convicting court." Pet.

Br. 24 n.3. But many of the aggravated felony definitions include facts that will rarely, if ever, be established as part of the underlying conviction, because they "refer to the particular circumstances in which an offender committed the crime on a particular occasion." *Nijhawan*, 129 S. Ct. at 2301. If petitioner's reading of "convicted" were correct, it would create significant uncertainty about the reach of these provisions.

For example, one "aggravated felony" is the fraud or deceit offense in 8 U.S.C. 1101(a)(43)(M)(i). The Court already has decided that the loss amount included in that definition need not be established as an element of the offense of "conviction." See *Nijhawan*, 129 S. Ct. at 2302. The same should be true for the fraud or deceit offense in 8 U.S.C. 1101(a)(43)(M)(ii), which requires a loss to the government exceeding $10,000. The "aggravated felony" in Subparagraph (D), which covers money laundering, likewise contains a loss threshold. 8 U.S.C. 1101(a)(43)(D). Similarly, the "aggravated felony" in Subparagraph (K)(ii) depends on a particular circumstance of the offense—there, that the offense be "committed for commercial advantage." 8 U.S.C. 1101(a)(43)(K)(ii).

Other aggravated felony definitions refer to circumstances that are even less likely to be established in a prior proceeding. Subparagraphs (N) and (P) exclude from the covered immigration-related offenses "a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding the alien's spouse, child, or parent." 8 U.S.C. 1101(a)(43)(N) and (P); see *Nijhawan*, 129 S. Ct. at 2300-2301. Because those provisions place the burden on the alien, such circumstances will almost never be established as part of a prior "conviction." In-

terpreting "convicted" as petitioner suggests, then, would have anomalous implications for several aggravated felonies beyond the one at issue.

There is no reason to adopt a statutory construction that would lead to these interpretive problems, particularly when a straightforward and commonsense reading of the statute reveals an easily administrable rule: if the alien was convicted of a second drug possession offense, and he committed that offense after a prior drug offense had become final, his second offense is an aggravated felony.

C. Treating A Second Drug Possession Offense As An Aggravated Felony Furthers Congress's Purposes

Through the INA's "aggravated felony" provisions, Congress responded to the serious threat to public safety and the substantial drain on societal resources that criminal aliens pose. The particular provision at issue here embodies Congress's determination that aliens who commit serious drug crimes should be removable from the United States and should not be eligible for immigration benefits. Congress long has regarded recidivist drug possession as a serious crime. Indeed, it has authorized felony punishment for that crime since at least 1970. There is little reason to doubt that Congress intended to deny immigration benefits to an alien like petitioner, who has repeatedly committed crimes —including multiple drug possession offenses—in the United States.

1. In 1988, Congress first provided that an alien who had been convicted of an "aggravated felony" would be subject to removal and other immigration consequences. Anti-Drug Abuse Act of 1988 (Anti-Drug Abuse Act), Pub. L. No. 100-690, §§ 7342-7349, 102 Stat. 4469. The

provision at issue here—"any drug trafficking crime as defined in section 924(c)(2) of title 18"—was included in the aggravated felony definition from the outset. *Id.* § 7342, 102 Stat. 4469 (8 U.S.C. 1101(a)(43) (1988)).

The inclusion of the drug trafficking aggravated felony responded to the recognition that the commission of crimes by aliens was "complicating and frustrating an already overburdened legal and penal system," and that the involvement of aliens in drug crimes presented an especially "difficult and dangerous problem." *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Federal Spending, Budget, & Accounting, of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 1 (1987) (statement of Sen. Chiles). That problem was especially acute with respect to criminal aliens who were recidivists. See, *e.g.*, 133 Cong. Rec. 28,840 (1987) (statement of Rep. Smith) ("All too often, these aliens—whether here legally or illegally —who are arrested for various felonious crimes, evade deportation, dodge trials, and continue with their recidivist activities."). Thus, from the outset, Congress intended to reach through the definition of "aggravated felony" aliens who have committed drug crimes, especially those who have done so repeatedly.

Since 1988, Congress has expanded the INA's definition of "aggravated felony" on numerous occasions.[14] In doing so, Congress continued to recognize that "[t]he

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[14] See Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 321, 110 Stat. 3009-627; see also *INS* v. *St. Cyr*, 533 U.S. 289, 295-296 & n.4 (2001).

number of criminal aliens incarcerated in Federal and State prisons has grown dramatically in recent years," imposing significant costs on society. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 118 (1996).[15] And "many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those around them." H.R. Rep. No. 22, 104th Cong., 1st Sess. 6 (1995) (*1995 House Report*). See also 140 Cong. Rec. 4985 (1994) (statement of Sen. Roth) (criminal aliens who are not incarcerated pose "a serious threat to our public safety").

Congress therefore determined that aliens who have committed aggravated felonies—crimes that "clearly demonstrate a disregard for this nation's laws"—"have no legitimate claim to remain in the United States." *1995 House Report* 8. And Congress defined the class broadly, encompassing more than 20 categories of criminal conduct. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004). Indeed, Congress defined "aggravated felon[ies]" to be not just "a subset of felonies," because in some cases, "a misdemeanor can be an 'aggravated felony.'" *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002) (citing cases).

2. The CSA reflects Congress's longstanding judgment that repeated drug possession warrants enhanced punishment. In the Act that originally added the "aggravated felony" provision, Congress also amended Section 924(c), providing that "the term 'drug trafficking crime' means any felony punishable under the Con-

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[15] See also, *e.g.*, H.R. Rep. No. 22, 104th Cong., 1st Sess. 6 (1995) (noting "the high number of aliens, both legal and illegal, who commit crimes while enjoying the benefits of this country" and "[t]he significant cost [of] incarcerating those criminals").

trolled Substances Act" or two other laws. Anti-Drug Abuse Act, § 6212, 102 Stat. 4360. Congress did not intend to limit the term "drug trafficking crime" only to offenses strictly involving trafficking, but instead wished it to apply to "all drug felonies." 134 Cong. Rec. 32,695 (1988) (statement of Sen. Biden); see 134 Cong. Rec. 13,785 (1988) (statement of Sen. Kennedy) (definition of "drug trafficking crime" includes "all felony violations of the Controlled Substances Act"). And Congress specifically wished to reduce the "use" of illegal drugs, see Anti-Drug Abuse Act § 1010(3), 102 Stat. 4188; see also *id.* pmbl., 102 Stat. 4181, recognizing the societal costs imposed by demand for illegal drugs, and not just the supply, see, *e.g.*, 134 Cong. Rec. 32,652 (statement of Sen. Helms).

At the time Congress adopted that definition of "drug trafficking crime," a second drug possession offense was already punishable as a felony under the CSA. See 21 U.S.C. 844(a) (1988). Indeed, the enhanced punishment for recidivist possession has been a feature of federal law since at least 1970. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 404(a), 84 Stat. 1264 (second possession offense punishable by up to two years of imprisonment).[16] Congress's decision to provide harsher punishment for recidivist drug offenders reflects the commonsense judgment that a repeated offense is "more serious

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[16] As early as 1914, Congress began taxing and requiring registration of narcotics and imposed penalties for those who possessed narcotics without registering or paying the necessary taxes. See *Gonzales* v. *Raich*, 545 U.S. 1, 10-11 (2005) (citing Harrison Act of 1914, ch. 1, 38 Stat. 785 (repealed 1970)). As part of that scheme, Congress authorized enhanced penalties for persons who repeatedly possessed narcotics in violation of federal law. See 26 U.S.C. 7237(a) (1958).

because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation." *Rodriquez*, 128 S. Ct. at 1789; see also, *e.g.*, *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 541 (1989) ("[T]he severity of the maximum authorized penalty" constitutes a legislative "judgment about the seriousness of the offense.") (internal quotation marks omitted).[17] Thus, it has been Congress's longstanding and consistent view that a person who possesses illegal drugs after being convicted of a prior drug offense has engaged in serious criminal activity justifying felony punishment.

3. Congress's decision to deny immigration benefits to aliens who commit serious crimes, combined with its judgment that repeated drug possession is a serious crime, confirms that Congress did not want an alien who has been repeatedly convicted of state drug possession offenses to be able to remain in the United States, where he would "portend[] greater future danger." *Rodriquez*, 128 S. Ct. at 1789.

Petitioner is just such an alien. He was twice convicted of drug possession in state court, in addition to being convicted of a variety of other crimes, including domestic violence assault. See pp. 5-6, *supra*; see also J.A. 114a (IJ's remark that petitioner has "been dancing

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[17] Petitioner claims (Br. 21) that Congress did not want to distinguish between "a person convicted of simple possession who has no prior drug conviction" and "a person convicted of simple possession who has a prior drug offense." To the contrary: Congress determined that both persons could be prosecuted in federal court for the offense of drug possession, but the first-time offender could be punished only for a misdemeanor, while a repeat offender could be punished as a felon because of his greater culpability, dangerousness, and need for deterrence. See 21 U.S.C. 844(a).

with the law for a long time"). During the pendency of this case, he was removed from the United States. Even though petitioner had been convicted of several offenses and removed from the United States, he did not conform his conduct to United States law. He illegally reentered the United States (an act which is itself a federal felony, see 8 U.S.C. 1326(a)(2)) and was convicted of a third state drug possession offense. His original removal order (the order under review in this Court) was reinstated pursuant to 8 U.S.C. 1231(a)(5), and he was once again removed from the United States.[18] Petitioner has demonstrated a disregard for this Nation's laws, and as

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[18] The INA provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5). The directive in Section 1231(a)(5) that "the prior order of removal * * * is not subject to being reopened or reviewed" means that the prior order may not be collaterally attacked when it is reinstated under that provision. The quoted language does not bar review of the prior order on direct judicial review under 8 U.S.C. 1252(a)(1) where, as here, such proceedings remain pending at the time of the reinstatement of the prior order of removal. If the Court reverses the judgment below and holds that petitioner's second drug offense is not an aggravated felony that renders him ineligible for cancellation of removal, the case would then be remanded to the Board. The Board, or the IJ on further remand, could then consider the effect of petitioner's illegal reentry and subsequent removal pursuant to 8 U.S.C. 1231(a)(5) on his application for cancellation of removal. See, *e.g.*, *Gonzales* v. *Thomas*, 547 U.S. 183, 186-187 (2006) (per curiam); *INS* v. *Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam).

a result, he has "no legitimate claim to remain" here. *1995 House Report* 8.

4. Petitioner nonetheless points to Section 851 (Br. 30-32) as evidence that Congress did not want to make all aliens who are recidivist drug offenders ineligible for immigration benefits. But the procedural requirements specified there do not affect Congress's judgment in 21 U.S.C. 844(a) as to how severely the offenses are "punishable." And Section 851 has no application to immigration law, which implements Congress's judgment by rendering aliens who are recidivist drug offenders ineligible for many immigration benefits.

Congress's decision to allow prosecutorial flexibility in seeking enhanced punishment in federal criminal cases does nothing to lessen its longstanding judgment that criminal aliens (especially recidivists) should not be permitted to remain in the United States under the immigration laws. These laws implement a congressional judgment, separate and apart from any individual prosecution decision, concerning which aliens should be excluded from the country. See, *e.g.*, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Petitioner identifies nothing in the legislative record suggesting that Congress intended an alien's treatment under the immigration laws to depend on whether a state actually sentenced the alien as a recidivist. Congress in fact made a contrary judgment: it decided that *all* aliens who commit offenses serious enough to qualify as aggravated felonies—including repeat drug offenders—should be excluded from the United States.

Petitioner similarly fails to show (Br. 32-33) that Congress was concerned about aliens' ability to challenge the validity of their prior criminal convictions. If an alien believes his state criminal conviction was ob-

tained unlawfully, then he should seek direct review in the state of conviction or seek habeas review in state or federal court. See, *e.g.*, *Trench* v. *INS*, 783 F.2d 181, 184 (10th Cir.) (aliens may not collaterally attack state court convictions in removal proceedings but instead must bring such a challenge in the jurisdiction of conviction), cert. denied, 479 U.S. 961 (1986); cf. *Daniels* v. *United States*, 532 U.S. 374, 381-382 (2001); *Custis* v. *United States*, 511 U.S. 485, 497 (1994). There is no evidence to suggest that aliens are being removed based on invalid convictions, and petitioner has made no challenge to the validity of his convictions here. And Congress's repeated expansion of the "aggravated felony" provisions since 1988 makes plain its intention that criminal aliens be removed from the United States expeditiously.

D. Requiring A State Court To Find Recidivism Or Follow Federal Procedures Would Unnaturally Constrict The Statute's Scope And Result In A Patchwork Application Of The Immigration Laws

Congress intended the definition of "aggravated felony" in Section 1101(a)(43)(B) to depend upon "the classifications Congress itself chose," *Lopez*, 549 U.S. at 58, not varying state judgments about the seriousness of an offense. Petitioner's reading of the statute would subvert that intent.

1. As this Court explained in *Lopez*, by defining the aggravated felony in Section 1101(a)(43)(B) by reference to how a drug offense could be punished under the federal CSA, Congress "pegged the immigration statutes to the classifications Congress itself chose" and the judgments underlying those classifications. 549 U.S. at 58. This Court found "no hint in the statute's text" that Congress intended the aggravated felony definition to vary

based on how seriously a State treated a given offense. *Id.* at 59. Indeed, the Court "[could not] imagine that Congress took the trouble to incorporate its own statutory scheme" if it had "meant courts to ignore it whenever a State chose to punish a given act" differently. *Id.* at 58.

Yet that is precisely what would happen under petitioner's approach. In petitioner's view, if a State's laws do not authorize enhanced recidivist punishment for an offense, or if a state prosecutor decided not to pursue an available recidivist enhancement, then the offense does not count as an "aggravated felony." Under that view, the state legislature or a state prosecutor may "overrule [Congress's] judgment"—embodied in 21 U.S.C. 844(a) —that possession of a controlled substance following a prior drug conviction is serious criminal conduct. *Lopez*, 549 U.S. at 59.

In this case, Congress's policy judgment differs from Texas's policy judgment about the seriousness of petitioner's repeated drug offenses. Congress decided that "a prior conviction under [chapter 13 of Title 21], or a prior conviction for *any* drug, narcotic, or chemical offense chargeable under the law of any State" should subject a defendant to felony punishment. See 21 U.S.C. 844(a) (emphasis added). But under Texas law, a recidivism enhancement may be applied to a Class A misdemeanor only when "the defendant has been before convicted of a Class A misdemeanor or any degree of felony." Tex. Penal Code Ann. § 12.43(a)(2) (Vernon 2003). Because petitioner's first possession offense involved a type and amount of drugs that Texas placed in a different category (making it a Class B misdemeanor), A.R. 542, his first conviction could not support a recidivism enhancement for the second drug possession offense

under Texas law. See Pet. Br. 5 (acknowledging no enhancement was available here).[19]

Under *Lopez*, what matters is that the defendant's second possession offense was "punishable as a felony under [the CSA]." 549 U.S. at 60. Federal law does not distinguish between different kinds of prior drug offenses for purposes of subjecting a second or subsequent possession conviction to punishment as a felony. The State's choice not to impose a recidivism enhancement does not alter this feature of federal law, which is controlling for purposes of determining whether petitioner's conviction qualifies as an aggravated felony.

2. Petitioner's reading of the statute would create a patchwork application of federal immigration law, because state laws vary widely as to recidivist sentencing for drug offenders. As an initial matter, some States do not provide for enhanced recidivist sentences for a second drug possession offense at all.[20] Under petitioner's view, an alien can be convicted for drug possession again and again in those States and never qualify as an "aggravated felon."

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[19] In several pending petitions that raise the question presented here, a recidivist enhancement similarly was unavailable in state court. See, *e.g.*, Gov't Br. at 3-4, *Escobar* v. *Holder*, petition for cert. pending, No. 09-203 (filed Aug. 17, 2009) (no enhancement applicable under Illinois law); Gov't Br. at 3-4, *Cardona-Lopez* v. *Holder*, petition for cert. pending, No. 09-539 (filed Oct. 31, 2009) (no enhancement applicable under Texas law).

[20] Those states are New Jersey, Oregon, Washington, West Virginia, and Wyoming. Although Washington, West Virginia, and Wyoming provide for recidivist enhancements for drug offenses, they specifically exempt possession offenses. See Wash. Rev. Code Ann. §§ 69.50.408(3), 69.50.4013 (West 2007); W. Va. Code Ann. §§ 60A-4-401(c), 60A-4-408(c) (LexisNexis 2005); Wyo. Stat. Ann. §§ 35-7-1031(c), 35-7-1038(c) (2009).

In States that authorize enhanced sentences for recidivist drug possessors, the circumstances that support enhancement vary widely. For example, some States permit an enhanced sentence only if the offense was committed within a certain period of time after the initial conviction or release from custody.[21] That judgment contrasts with Congress's authorization of an enhancement in 21 U.S.C. 844(a) regardless when the first offense occurred. Moreover, while federal law long has allowed a prior conviction to be "under the law of any State," 21 U.S.C. 844(a) (1988), some States authorize sentence enhancements only when the prior drug possession conviction occurred within the State.[22]

Further, as this case demonstrates, some state enhancements are limited based on the type of drugs involved in the two offenses,[23] even though federal law authorizes an enhanced sentence for recidivist possession of *any* controlled substance (unless the initial pos-

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[21] See, *e.g.*, Cal. Health & Safety Code § 11357(b) (West 2007); Minn. Stat. Ann. §§ 152.01, Subdiv. 16a, .021, Subdiv. 2 and 3(b) (West Supp. 2010); N.Y. Penal Law § 70.06(1)(b)(iv) (McKinney Supp. 2010), *id.* § 221.05 (McKinney 2008).

[22] See, *e.g.*, Del. Code Ann. tit. 16, §§ 4751-4752, 4763 (Supp. 2008); Mass. Gen. Laws Ann. ch. 94C, § 34 (West Supp. 2009); Tenn. Stat. Ann. § 39-17-418(a) and (e) (2006); Utah Code Ann. § 58-37-8 (Supp. 2009); Vt. Stat. Ann. tit. 18, §§ 4232(a), 4235(b), 4238 (2002); *id.* §§ 4230(a)(1), 4231(a), 4233(a), 4234(a) (Supp. 2009); Va. Code Ann. § 18.2-250.1(A) (2009).

[23] See pp. 46-47, *supra*; see also, *e.g.*, Cal. Health & Safety Code § 11357 (West 2007); Ky. Rev. Stat. Ann. §§ 218A.1415(1) and (2)(b), .1416(1) and (2)(b), .1417(1) and (2)(b) (LexisNexis 2007); Mass. Gen. Laws Ann. ch. 94C, § 34 (West Supp. 2009); Okla. Stat. Ann. tit. 63, § 2-402(B)(1) and (2) (West Supp. 2010); Vt. Stat. Ann. tit. 18, §§ 4232(a), 4235(b), 4238 (2002); *id.* §§ 4230(a)(1), 4231(a), 4233(a), 4234(a) (Supp. 2009); Va. Code Ann. §§ 18.2-250, -250.1 (2009).

session offense for that substance was a felony), see 21 U.S.C. 844(a). In addition, some States permit recidivist enhancements only for third, fourth, or subsequent possession convictions, rather than for a second possession conviction.[24] Finally, Section 1101(a)(43) applies to foreign convictions that are less than 15 years old, 8 U.S.C. 1101(a)(43) (penultimate sentence), notwithstanding that other countries vary widely in how they treat drug offenses.

The application of the "aggravated felony" provisions would further fragment if courts were to consider petitioner's second argument, which is that the state court must enter a second drug possession conviction in compliance with procedures like those in 21 U.S.C. 851. Before the Board, the parties were unable to "identif[y] any State that prosecutes recidivist offenses in a manner that exactly parallels the CSA's recidivist requirements." Pet. App. 27a. The Board therefore recognized that, under petitioner's view, immigration judges would need to compare state and federal procedures as to the form and timing of notice of a recidivist enhancement and the allocation of burdens of proof. *Id.* at 32a n.10. Similarly, immigration judges would have to address whether state statutes of limitations for challenging prior convictions correspond to the limitations period in 21 U.S.C. 851(e). And immigration judges would have to figure out how to answer all of these questions for foreign convictions. See 8 U.S.C. 1101(a)(43) (penultimate sentence).

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[24] See, *e.g.*, Cal. Health & Safety Code § 11357(b) (West 2007); Cal. Penal Code § 1210.1(b)(5) (West Supp. 2010); Ind. Code Ann. § 35-50-2-10(e) and (f) (LexisNexis 2009); Neb. Rev. Stat. Ann. §§ 28-416, 29-2221(1) (LexisNexis 2009); N.C. Gen. Stat. §§ 14-7.1, 14-7.6, 90-95(a) (2007); Tenn. Stat. Ann. § 39-17-418(e) (2006).

Petitioner provides no explanation for why Congress would have wanted immigration judges to undertake such complicated inquiries in otherwise straightforward removal cases—inquiries far removed from Congress's essential judgment in 21 U.S.C. 844(a), incorporated into the INA, about the seriousness of a successive drug possession offense. Petitioner also nowhere identifies which States have drug possession offenses that would qualify as aggravated felonies under his view. His failure to address the consequences of his view speaks volumes. There is simply no reason to believe that Congress expected an alien's treatment as an aggravated felon to require any inquiry into the myriad variations of state and foreign law. This Court on a number of occasions has rejected statutory constructions that would lead to such an uneven and cumbersome application of federal law. See, *e.g.*, *Nijhawan*, 129 S. Ct. at 2301-2302; *Hayes*, 129 S. Ct. at 1087-1088; *Burgess*, 128 S. Ct. at 1579-1580. It should do the same here by recognizing that Congress determined that any second drug possession conviction (an offense long punishable under the CSA as a felony) qualifies as an aggravated felony.

E. No Canon of Construction Is Required To Resolve This Case

Contrary to petitioner's contention (Br. 38-40), the Court should not resort to any canon of construction to resolve this case. Because the definition of "aggravated felony" depends on an interpretation of the criminal laws, the rule of lenity is potentially applicable. See *Leocal*, 543 U.S. at 11 n.8.[25] But resort to that principle

[25] Petitioner contends (Br. 38) that this case implicates the proposition that any ambiguities should be construed in favor of the alien. Application of such a rule would be particularly odd here, because Con-

is appropriate only if there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted); see also, *e.g.*, *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (before resorting to the rule of lenity, the Court considers the "the language and structure, legislative history, and motivating policies of the statute") (internal quotation marks omitted)).

There is no grievous ambiguity in this case. The statutory text makes plain that Congress intended to treat a second drug possession offense as an aggravated felony. Petitioner's contrary view would thwart Congress's goal of removing recidivist criminal aliens, and would lead to a patchwork application of federal immigration law.

Moreover, petitioner cannot claim that his conduct is so innocent or innocuous as to trigger fair warning concerns. See, *e.g.*, *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005). Petitioner does not dispute that he is a repeat drug offender, that he could have been prosecuted as a felon in federal court for his second offense, and that he is removable on the basis of his second drug offense. Contrary to petitioner's contention

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gress has made clear that it does not wish to give the benefit of the doubt to criminal aliens, see pp. 38-42, *supra*, and the "aggravated felony" provision at issue applies only to aliens who are convicted drug offenders. In any event, a court may properly consider whether remaining ambiguities should be resolved in favor of the alien only *after* the court had used every interpretative tool at its disposal. *E.g.*, *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007). No such ambiguity remains at the end of the interpretive process here.

(Br. 39-40), an alien who repeatedly fails to conform his conduct to United States law is on notice that his crimes could have immigration consequences. There is no warrant for application of the rule of lenity here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[2] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

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[1] So in original. Probably should be preceded by "is".

[2] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[3]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

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[3] So in original. Probably should be followed by a semicolon.

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was

completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

* * * * *

2. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

* * * * *

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * * * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * * * *

3. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien under this section or such section 1254(a) of this title.

* * * * *

4. 8 U.S.C. 1326 provides:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of

this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

* * * * *

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

---

[1] So in original. The period probably should be a semicolon.

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

5. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or chapter 705 of Title 46.

* * * * *

6. 21 U.S.C. 844 provides:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person

knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mix-

ture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub. L. No. 98-473, Tit. II, § 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation,

sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

7. 21 U.S.C. 851 provides:

Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution

of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

8. Section 481.104 of the Tex. Health & Safety Code Annotated (Vernon 2003) provides:

Penalty Group 3

(a) Penalty Group 3 consists of:

* * * * *

(2) a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

a substance that contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid not otherwise described by this subsection;

a compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any salt of any of these, and one or more active medicinal ingredients that are not listed in any penalty group;

a suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any salt of any of these drugs, and approved by the United States Food and Drug Administration for marketing only as a suppository;

Alprazolam;

* * * * *

9. Section 481.117 of the Tex. Health & Safety Code Annotated (Vernon 2003) provides:

Offense: Possession of Substance in Penalty Group 3

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under Subsection (a) is a Class A misdemeanor if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than 28 grams.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 28 grams or more but less than 200 grams.

(d) An offense under Subsection (a) is a felony of the second degree, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than five years, and a fine not to exceed $50,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

10. Section 481.121 of the Tex. Health & Safety Code Annotated (Vernon 2003) provides:

Offense: Possession of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.

(b) An offense under Subsection (a) is:

(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;

(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;

(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;

(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;

(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and

(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

11. Section 12.43 of the Tex. Penal Code Annotated (Vernon 2003) provides:

Penalties for Repeat and Habitual Misdemeanor Offenders

(a) If it is shown on the trial of a Class A misdemeanor that the defendant has been before convicted of a Class A misdemeanor or any degree of felony, on conviction he shall be punished by:

(1) a fine not to exceed $4,000;

(2) confinement in jail for any term of not more than one year or less than 90 days; or

(3) both such fine and confinement.

(b) If it is shown on the trial of a Class B misdemeanor that the defendant has been before convicted of a Class A or Class B misdemeanor or any degree of felony, on conviction he shall be punished by:

(1) a fine not to exceed $2,000;

(2) confinement in jail for any term of not more than 180 days or less than 30 days; or

(3) both such fine and confinement.

(c) If it is shown on the trial of an offense punishable as a Class C misdemeanor under Section 42.01 or 49.02 that the defendant has been before convicted under either of those sections three times or three times for any combination of those offenses and each prior offense was committed in the 24 months preceding the date of commission of the instant offense, the defendant shall be punished by:

(1) a fine not to exceed $2,000;

(2) confinement in jail for a term not to exceed 180 days; or

(3) both such fine and confinement.

(d) If the punishment scheme for an offense contains a specific enhancement provision increasing punishment for a defendant who has previously been convicted of the offense, the specific enhancement provision controls over this section.

REPLY BRIEF

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Supreme
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OFFICE OF THE CLERK

No. 09-60

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case concerns whether petitioner and other longtime permanent resident aliens are categorically ineligible to seek discretionary cancellation of removal, no matter how deep their connections to the country, whenever they are convicted of a second minor drug possession offense. The INA renders ineligible for discretionary cancellation of removal a permanent resident alien who "*has . . . been convicted* of an[] aggravated felony," including a "drug trafficking crime," defined as a "*felony* punishable under the [CSA]." 8 U.S.C. §§ 1229b(a)(3), 1101(a)(43)(B); 18 U.S.C. § 924(c)(2) (emphases added). It is thus undisputed that, to lose eligibility to seek cancellation of removal, a permanent resident alien must have been "convicted" of a "felony" as defined by the CSA. *See Lopez v. Gonzales*, 549 U.S. 47, 56-57 (2006) (construing "felony punishable under" the CSA to mean "felony as defined by" the CSA). Conversely, a permanent resident alien convicted of a misdemeanor as defined by the CSA retains eligibility to seek cancellation of removal.

Petitioner was convicted of a misdemeanor as defined by the CSA, not a felony. He was convicted under state law of a minor drug possession offense—possession of a controlled substance (Xanax) without a prescription—which is a misdemeanor under the CSA. There was no finding or charge in petitioner's state proceeding that he had a prior drug conviction. In the absence of such a finding, petitioner's maximum sentence under the CSA for his drug possession conviction would have been one year of imprisonment, *viz.*, a misdemeanor sentence. 21 U.S.C. § 844(a). Indeed, the Government acknowledges that "[a] finding of a final prior conviction is required

for felony punishment" under the CSA. Gov't Br. 28. It follows necessarily that, in the absence of any such finding of a prior conviction, a person has been convicted of a misdemeanor as defined by the CSA, not a felony as defined by the CSA.

The Government nonetheless argues that any alien convicted of a minor drug possession offense has been convicted of a felony—indeed, an "aggravated felony"—as long as he has a prior drug possession conviction, regardless of whether the court made any finding of (or was even aware of) the prior conviction. That counterintuitive understanding defies the statutory text. The INA requires that an alien "have been convicted" of a "felony," not that he *could have been convicted* of a felony had additional findings or charges been made. Because prosecutors seek a recidivism enhancement for a minor drug possession offense under the CSA only exceedingly rarely, the Government's approach would have the effect of transforming *every* minor drug possession conviction into a felony in the event of a prior conviction, even though a felony sentence in fact is virtually *never* made available in that situation.

The Government's understanding is particularly anomalous when considered in light of Congress's overarching objective to establish drug "trafficking" as an aggravated felony. 8 U.S.C. § 1101(a)(43)(B). As this Court recognized in *Lopez*, drug possession could be deemed drug "trafficking" only if the INA coerces that conclusion. There is no statutory compulsion to consider a person convicted of a minor drug possession offense to be a drug "trafficker" whenever he has a prior conviction for possession, even in the absence of any judicial finding of recidivism and any prosecutorial decision to bring a re-

cidivism charge. Any such reading would be particularly unwarranted in view of the lenity principles applicable here. In the Government's view, a person who agrees to plead guilty to simple drug possession if the prosecutor forgoes any charge of recidivism, and who thereby avoids any possibility of a felony sentence, *unambiguously* would have been "convicted" of a drug "felony" notwithstanding the impossibility of his receiving a felony sentence for his conviction. That conclusion is untenable.

In the end, there is no adequate indication in the statute—unambiguous or otherwise—that Congress sought to foreclose entirely the grant of discretionary cancellation of removal to longtime permanent resident aliens with deep ties to the country whenever they are convicted of a second minor drug possession offense. The Government of course would retain full discretion to deny such an alien relief because of his convictions and to order his removal. But the issue here is whether a longtime permanent resident alien is categorically barred from even *applying* for a favorable exercise of discretion in the circumstances of this case. The Government identifies no sound interest served by foreclosing any opportunity even to apply for a favorable exercise of discretion, and no sound support for that understanding in the statutory terms or purposes.

I. PETITIONER WAS CONVICTED OF MISDEMEANOR SIMPLE POSSESSION, NOT FELONY RECIDIVIST POSSESSION

A. A Person Has Been Convicted Of The Felony Of Recidivist Possession Only If The Convicting Court Made A Finding Of Recidivism

1. The language of the INA controls the question whether a longtime permanent resident alien convicted a second time for minor drug possession is subject to mandatory deportation without any opportunity to seek discretionary relief based on his individual equities. As relevant here, the INA subjects to mandatory removal an alien who has been "convicted" of "a felony punishable under the [CSA]." 18 U.S.C. § 924(c)(2). The INA defines the key term "conviction" as "a formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A); *see* Fed. R. Crim. P. 32(k)(1) (defining "judgment of conviction"). Mandatory removal therefore is triggered when a court enters a formal judgment of guilt of the facts necessary to make an offense "a felony punishable under the [CSA]."

Under the CSA, possession of a controlled substance is generally a *misdemeanor* subject to a sentence of not more than one year. *See* 21 U.S.C. § 844(a); *Lopez*, 549 U.S. at 53-54 & n.4. But possession of a controlled substance after a prior drug conviction has become final—*viz.*, "recidivist possession," *id.* at 55 n.6—is a *felony* subject to a term of imprisonment of not more than two years. 21 U.S.C. § 844(a). Thus, a person formally judged guilty of possession is convicted of a misdemeanor punishable

under the CSA, while a person formally judged guilty of recidivist possession is convicted of a felony punishable under the CSA. *See* App., *infra*, 1a-14a (formal judgment of guilt specifying that defendant was convicted of recidivist possession under 21 U.S.C. §§ 844(a) and 851).

Petitioner was formally judged guilty of possession of a controlled substance. He was not formally judged guilty of recidivist possession. Accordingly, petitioner was "convicted" of the misdemeanor of simple drug possession, not the "felony" of recidivist possession.

2. The Government argues that petitioner was subject to mandatory deportation because he *committed* a second possession offense, and recidivist possession is punishable as a felony under the CSA. Gov't Br. 20-21 & n.9; *id.* at 44 (Congress "decided that *all* aliens who *commit* offenses serious enough to qualify as aggravated felonies—including repeat drug offenders—should be excluded from the United States." (second emphasis added)). The INA, however, does not subject to mandatory deportation an alien found to have "committed" a "felony" punishable under the CSA. It instead subjects to mandatory deportation only an alien who has been "convicted" of a "felony" punishable under the CSA.

The fallacy of the Government's approach is best illustrated by considering its implications if petitioner had been prosecuted and convicted in the federal system. The Government acknowledges—as it must, *see* Pet. Br. 22-24—that its understanding would equally apply in that situation, and that there is no relevant distinction between the two scenarios. *See* Gov't Br. 36. If petitioner had pleaded guilty to

drug possession under Section 844(a), and there were no judicial finding of recidivism, petitioner would have been convicted of a misdemeanor: in that event, he *could not have been sentenced* to more than one year of imprisonment for his conviction. *See* 21 U.S.C. § 844(a). As the Government itself concedes, "[a] finding of a final prior conviction is required for felony punishment" under the CSA. Gov't Br. 28.

Yet under the Government's interpretation, petitioner nonetheless would be deemed to have been "convicted" of a "felony" because, as a result of his prior conviction for possession, he in theory *could have been* convicted of felony recidivist possession, even though he was not. The Government characterizes that outcome as "hardly anomalous," Gov't Br. 36, but its attempted explanation is hardly comprehensible. Simply put, a person who could receive only a misdemeanor sentence for his conviction cannot sensibly be considered to have been "convicted" of a "felony." The Government's interpretation defies not only the statutory text, but also the reality in practice that prosecutors virtually *never* elect to seek a felony recidivism enhancement in a prosecution for drug possession under Section 844(a). *See* NAFD Br. 16; CACL Br. 24-25. While essentially *no* drug possessor with a prior conviction thus faces a felony sentence under the CSA as a matter of practice, the Government would treat *every* such person as having been convicted of a felony.

The Government stresses that a "felony penalty would have been available in federal court" because of petitioner's prior conviction. Gov't Br. 22. But regardless of whether a felony sentence would have been "available" in the abstract, the statute directs attention to whether a person has been "convicted" of

a "felony" in fact. The relevant point at which to assess the availability of a felony sentence therefore is the time of the "conviction"—*i.e.*, the "formal judgment of guilt . . . entered by [the] court." 8 U.S.C. § 1101(a)(48)(A). And it is well-established that the entry of the formal "judgment of conviction includes both the adjudication of guilt and the sentence." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see* Fed. R. Crim. P. 32(k)(1) ("In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence."); J.A. 31a-34a. When a court enters a formal judgment of guilt of drug possession and sets forth the sentence, there could be no felony sentence under the CSA unless there has been a finding of recidivism. Without such a finding, therefore, a person convicted of drug possession cannot have been "convicted" of a "felony" as defined by the CSA.[1]

3. The incompatibility of the Government's theory with the text of the INA comes into sharp relief when considering the implications for other statutes that similarly turn on whether the defendant is "convicted" of a "felony" or of a "misdemeanor." Under the Federal Magistrates Act, for instance, a magis-

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[1] The Government erroneously states that a "conviction" or "formal judgment of guilt" occurs when the "elements of the crime have been established beyond a reasonable doubt." Gov't Br. 23. Insofar as the Government means to suggest that the requisite formal judgment of guilt occurs when a jury renders a verdict of guilt, any such suggestion is contradicted by the terms of the statutory definition, which define a "conviction" as a "formal judgment of guilt . . . entered by *a court*." 8 U.S.C. § 1101(a)(48)(A) (emphasis added); *see Deal*, 508 U.S. at 131 ("the word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding," and which meaning governs "must be drawn from the [statutory] context").

trate judge's authority is confined "to try[ing] persons accused of, and sentenc[ing] persons *convicted* of . . . *misdemeanors*." 18 U.S.C. § 3401(a) (emphases added). A magistrate has no authority to try persons accused of, or to sentence persons convicted of, felonies. 28 U.S.C. § 636(a)(3). The Government presumably would not argue that magistrate judges lack authority to try and to sentence any defendant for misdemeanor drug possession in the event the defendant has a prior drug conviction. Yet under the Government's theory, if petitioner had been convicted of drug possession by a magistrate judge, he would have been "convicted" of a "felony" because he has a prior drug possession conviction, even if the prior conviction made no appearance whatsoever in the proceedings giving rise to his conviction.

The felon-in-possession statute similarly underscores the fundamental flaws in the Government's approach. That statute makes possession of a firearm "unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Under the plain language of that provision, a person with a prior drug possession offense who negotiates a plea to simple possession rather than recidivist possession would avoid the firearms ban because his conviction was not "punishable by imprisonment for a term exceeding one year." Under the Government's interpretation, however, his conviction for that misdemeanor offense nonetheless would make it illegal for him to possess a firearm because he could have been convicted of felony recidivist possession, even though he was not.

4. Congress's election to impose a "conviction" requirement was not inadvertent. While Congress

refused to impose a conviction requirement in other statutes, it made the contrary choice here.

In the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(1), for instance, Congress defined "racketeering activity" to include "any [listed] *act or threat* . . . which is *chargeable* under State law and *punishable* by imprisonment for more than one year," "any *act* which is *indictable* under" certain provisions of federal law, and "any *offense*" involving a drug felony. *Id.* (emphases added); *see also id.* §§ 1952(b), 1956(c)(7)(A). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court rejected the view that this language requires a conviction for racketeering activity. The Court explained that, "[a]s defined in the statute, racketeering activity consists not of acts for which the defendant *has been convicted*, but of acts *for which he could be*." *Id.* at 488 (emphases added). The Court added that, "[w]hen Congress intended that the defendant have been previously convicted, it said so." *Id.* at 489 n.7 (citing statutes). Congress has also dispensed with the requirement of a conviction in other statutes. *See, e.g.*, 18 U.S.C. §§ 924(c)(1)(A), 1028A.

In the INA, by contrast, Congress expressly required a conviction. An alien therefore is subject to mandatory removal only for acts "for which he has been convicted," not for acts "for which he could be." *Sedima*, 473 U.S. at 488. The Government's position effectively obliterates that distinction, subjecting an alien to mandatory deportation not because he has been convicted of recidivist possession, but because he could have been.

5. In defense of its position, the Government re-

lies heavily on the word "punishable" in the statutory phrase, "punishable under the [CSA]." According to the Government, petitioner's interpretation strips that word of any meaning. Gov't Br. 24-25. The Government is mistaken.

As this Court held in *Lopez*, the phrase "felony punishable under the [CSA]" means "felony as defined by the Act." 549 U.S. at 56 (quotation marks omitted). The phrase "punishable under the [CSA]" therefore serves two important purposes: (i) it makes clear that the conviction must be defined as a felony under federal law (the CSA), rather than under state law; and (ii) it makes clear that a state conviction can qualify as a felony that triggers mandatory deportation and that the alien need not have been convicted under the CSA, something that might not have been clear if the statute encompassed a person convicted of a felony "punish*ed* under the CSA" rather than one "punish*able* under the CSA." The Government thus simply errs in suggesting that petitioner's interpretation turns "on how an offender *actually was punished* in state court." Gov't Br. 25.

Petitioner's interpretation follows from—and is fully consistent with—*Lopez*'s interpretation of the phrase "punishable under the [CSA]." Petitioner makes no argument that he was convicted of a misdemeanor rather than a felony because *state law* defines simple possession as a misdemeanor. Nor does petitioner suggest that only a federal conviction could qualify. Instead, petitioner contends that his state law conviction is a misdemeanor rather than a felony because *federal law* defines possession without a finding of recidivism as a misdemeanor. Of course, federal law defines recidivist possession as a felony. But petitioner was not convicted of recidivist

possession; he was convicted of possession alone, without any finding that he was a recidivist. He therefore was convicted of a misdemeanor as defined by the CSA, not a felony.

The Government, while allowing that a "finding of a final prior conviction is required for felony punishment," asserts that no such finding is required "for conviction of a drug possession offense under Section 844." Gov't Br. 28. But as this Court made clear in *Lopez*, the offense that renders a state conviction an aggravated felony is not mere "drug possession," as the Government would have it, but is "recidivist possession." 549 U.S. at 55 n.6. Because petitioner was convicted of drug possession rather than recidivist possession, he was not convicted of the offense identified in *Lopez* as the offense that would render him categorically ineligible for discretionary cancellation of removal.

B. The INA's Treatment Of Other Felony Drug Possession Offenses Confirms That Petitioner Was Not Convicted Of Recidivist Possession

1. Under the CSA, possession of a controlled substance can constitute a felony not only when the defendant has a prior drug conviction, but also when the defendant has an intent to distribute, or when he possesses more than five grams of cocaine base. 21 U.S.C. §§ 841, 844(a). The INA's treatment of those felony offenses confirms that petitioner was not convicted of felony recidivist possession.

In particular, if an alien were convicted of drug possession, he would not be subject to mandatory deportation simply because an immigration judge (IJ) subsequently determined that, given the large

quantity of drugs possessed, the alien necessarily had an intent to distribute. The INA's requirement that an alien be "convicted" of a "felony" would require a formal judgment by the convicting court of an intent to distribute. The Court established precisely that point in *Lopez*, explaining that "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation" due to the absence "of a federal felony defined as possessing a substantial amount." 549 U.S. at 60.

To the same effect, an alien convicted of possessing cocaine base would not be subject to mandatory removal simply because an IJ subsequently found that he possessed more than five grams of the substance. The requirement that the alien have been "convicted" of a "felony" would require a formal determination by the convicting court that the defendant possessed more than five grams of cocaine base.

Recidivist possession operates in the same fashion. A person convicted of drug possession is not subject to mandatory removal simply because an IJ subsequently concludes that the person had a prior conviction for drug possession. Rather, the requirement that a person have been "convicted" of a "felony" requires that a finding of recidivism have been made by the convicting court.

2. The Government does not argue that an IJ could transform a misdemeanor conviction for drug possession into a felony conviction by finding that the alien had an intent to distribute. Nor does the Government suggest that an IJ could convert a misdemeanor conviction for possession of cocaine base into a felony conviction by finding that the alien possessed more than five grams. But the Government

argues that recidivism operates differently because it is a sentencing factor rather than an element of the offense, and *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998), allows that particular factor to be determined by the court rather than a jury. The Government's argument is unpersuasive.

To be sure, *Almendarez-Torres* establishes that, unlike any other fact that increases the statutory maximum sentence, recidivism may be found by a court rather than a jury. 523 U.S. at 244. But that *constitutional* rule sheds no light on the question of *statutory* interpretation at issue here.

That statutory question instead is answered by the statutory requirement that the alien have been "convicted" of a "felony." From the perspective of that statutory requirement, there is no relevant distinction between recidivism, intent to distribute, and possession of more than five grams of cocaine base. With respect to each of those three facts, a finding of the relevant fact elevates what would otherwise constitute a conviction for misdemeanor drug possession into a conviction of a felony. In all three cases, unless that essential fact is found by the convicting court, an alien has not been "convicted" of a "felony." He instead has been convicted of misdemeanor drug possession. Nothing in *Almendarez-Torres* suggests otherwise.

C. The Three-Or-More-Misdemeanors Provision Shows That Congress Did Not Equate Multiple Drug Misdemeanor Convictions With An Aggravated Felony

The Government's position that a conviction of two misdemeanor possession offenses amounts to a conviction of a felony also cannot be reconciled with the illegal-reentry statute. Under that statute, Congress established a *20-year* statutory maximum for reentry after conviction for an *aggravated felony*, a *ten-year* maximum for reentry following conviction of "*three or more misdemeanors involving drugs, crimes against the person, or both*," and a *two-year* maximum for reentry following convictions *for other lesser offenses*. 8 U.S.C. § 1326 (emphases added). Yet, under the Government's reading, a person convicted of two misdemeanor drug possession offenses, and a person convicted of three or more misdemeanor drug possession offenses, would both be subject to a 20-year maximum because they could have been convicted of recidivist possession, even though they were not.

According to the Government, allowing a conviction for three or more misdemeanor possession offenses to subject an alien to 20 years of imprisonment would not deprive the three-or-more-misdemeanors provision of effect because it would continue to apply to (i) three or more misdemeanor convictions for crimes against the person; (ii) two misdemeanor convictions for crimes against the person and one misdemeanor conviction for possession; and (iii) other similar combinations. Gov't Br. 35-36. Petitioner, however, does not contend that the provision would be deprived of all effect under the Gov-

ernment's interpretation.

Petitioner's argument instead is that the three-or-more-misdemeanors provision facially applies to three or more misdemeanor drug possession offenses, just as it facially applies to the other combinations of offenses specified by the Government. And the Government's interpretation doubles the sentence facially applicable to that substantial subset of cases. Indeed, although a person convicted of *two* misdemeanor offenses is facially subject to a *two-year* maximum, the Government's interpretation would subject him to a *20-year* maximum if the two misdemeanors are minor drug possession offenses. It "is impossible to believe that Congress intended that [18-year] quantum leap in punishment" without saying so with greater specificity. *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107 (2009).

D. There Is No Clear Statutory Command To Treat Petitioner's Conviction As "Illicit Trafficking"

1. The aggravated felony category at issue is "illicit trafficking," including "any felony punishable under the [CSA]." 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). As this Court emphasized in *Lopez*, the ordinary meaning of "illicit trafficking" is "commercial dealing." 549 U.S. at 54. Because simple drug possession does not involve "commercial dealing," it does not fall within the ordinary meaning of "illicit trafficking." *Id.*

That does not mean that a conviction for recidivist possession falls outside the category of illicit trafficking. Because recidivist possession is "a felony punishable under the [CSA]," it qualifies as illicit trafficking. But as the Court explained in *Lopez*,

possession offenses should be viewed as "illicit trafficking" only when there is a "clear statutory command to override ordinary meaning." 549 U.S. at 55 n.6. And while there is a clear statutory command overriding ordinary meaning with respect to convictions for recidivist possession, there is no such clear statutory command with respect to convictions for mere possession without any finding of recidivism by the convicting court. Under the interpretive principles established in *Lopez*, accordingly, a conviction for simple possession without any finding of recidivism fails to compel an alien's mandatory removal.

2. The Government argues that petitioner's interpretation stands at odds with Congress's purposes because Congress "decided that *all* aliens who commit offenses serious enough to qualify as aggravated felonies—including repeat drug offenders—should be excluded from the United States." Gov't Br. 44. But Congress made no such determination. While Congress's definition of "illicit trafficking" sweeps within it any felony punishable under the CSA, including recidivist possession, Congress made no decision that all permanent resident aliens found to have "committed" a drug felony should be removed from the United States without any opportunity to seek discretionary relief. Congress instead required that an alien have been "convicted" of a drug felony.

The Government's argument also fails to take into account the limited consequences of accepting petitioner's interpretation. Under that interpretation, aliens convicted of drug possession, and who have a prior drug conviction, would gain no automatic entitlement to remain in this country. Rather, an alien convicted of possession (other than one-time possession of a small amount of marijuana) remains

subject to removal. 8 U.S.C. § 1227(a)(2)(B)(i). The consequence of accepting petitioner's position instead would be that certain longtime permanent resident aliens convicted of simple possession would retain an opportunity to persuade the Attorney General to grant *discretionary* relief permitting them to remain in the country notwithstanding a prior drug conviction. *Id.* § 1229b(a). In considering an application for discretionary relief, the Attorney General would remain free to take into account all of the alien's circumstances, including any prior convictions. The Government identifies no discernible harm to its interests if the Attorney General were merely *allowed* to exercise discretion in favor of a permanent resident alien whom the Attorney General finds to have made a compelling case to remain in the country despite a prior drug conviction.

E. This Court's Decisions Support Petitioner's Interpretation, Not The Government's

The Government contends that the Court's decision in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *United States v. Hayes*, 129 S. Ct. 1079 (2009), and *United States v. Rodriquez*, 128 S. Ct. 1783 (2008), support its interpretation of the statute. Gov't Br. 26-31. Those decisions in fact support petitioner's understanding, not the Government's.

1. a. In *Nijhawan*, the Court held that an alien convicted of an "offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), is subject to mandatory deportation, even when the IJ, rather than the convicting court, finds that the loss to the victim exceeded $10,000. The Government reads

that holding to establish that a person convicted of drug possession without any finding of recidivism has been convicted of a felony if the IJ subsequently finds the existence of a prior drug conviction. The Government's reliance on *Nijhawan* is misplaced.

That case involved the question whether the term "convicted" applies only to the most immediate factor—"offense that . . . involves fraud or deceit"—or whether the term travels further to reach the secondary factor, loss to the victim exceeding $10,000. For two reasons, the Court concluded that the term "convicted" did not travel to the loss to the victim. First, the Court reasoned that the phrase, "in which the loss . . . exceeds $10,000," is most naturally read to refer to the underlying circumstances of the conviction rather than the conduct found by the convicting court. And second, the Court determined that a contrary interpretation would leave an entire aggravated felony category "with little, if any, meaningful application," because there is "no widely applicable federal statute that contains a relevant [*i.e.*, $10,000] monetary loss threshold." *Nijhawan*, 129 S. Ct. at 2301. Neither consideration is present here.

Because the statutory text at issue here requires a person to have been "convicted" of a "felony," the question is not whether the term "convicted" travels beyond an immediate object to reach any secondary statutory factor. Instead, the question is whether the term "convicted" applies to its only possible object—a "felony." The answer to that question has to be yes, or else the term "convicted" would be deprived of any meaning. And because the term "convicted" applies to the requirement that there be a "felony," and because the fact that renders drug possession a felony is recidivism, the term "convicted"

calls for a finding of recidivism by the convicting court.

Nor does that interpretation leave the aggravated-felony category at issue without any meaningful application. The relevant category at issue is "illicit trafficking," including any "felony punishable under the [CSA]." If the term "convicted" applies to the facts that make an offense a "felony," that category would plainly have meaningful application. It reaches convictions for a broad range of federal and state *trafficking* offenses, including convictions for drug manufacturing, distribution, possession with intent to distribute, and conspiracy to commit each of those. *See, e.g.*, 21 U.S.C. § 841. Even if the drug trafficking category were narrowed so as to consider only the offense of recidivist possession, the category would still encompass federal convictions for recidivist possession under Section 844(a). It would also encompass convictions under counterpart state laws, *see Lopez*, 549 U.S. at 59-60, and at least 45 States have a counterpart crime of recidivist possession. *See* NACDL Br. 12-13 & n.15 (citing state laws).

b. To be sure, state law recidivist possession offenses do not necessarily match the contours of federal recidivist possession in all their particulars. Gov't Br. 47-49. But there is substantial overlap, and state recidivist possession convictions therefore would frequently qualify as felonies punishable under the CSA. The variation on the particularities of state laws would have been unsurprising to Congress, and affords no basis to conclude that a person has been convicted of felony recidivist possession even absent any finding of recidivism by the convicting court. *See Lopez*, 549 U.S. at 60 ("Congress knows that any resort to state law will implicate

some disuniformity in state misdemeanor-felony classifications."). After all, states do not necessarily criminalize distribution of the same controlled substances; states do not necessarily proscribe possession with intent to distribute; and states do not necessarily have a separate offense prohibiting possession of more than five grams of cocaine base.

As these examples illustrate, Congress has not compelled states to enact counterpart offenses to federal drug felonies. It has instead provided that, when states *do* elect to establish an analogous offense, a conviction of that analogous offense subjects an alien to mandatory deportation. And of pivotal significance, as explained above, the absence of a precise match between state recidivist possession offenses and the scope of recidivist possession under Section 844(a) in no way denies the aggravated-felony category at issue meaningful application.

c. The Government argues that *Nijhawan* rejects petitioner's supposed view that "all facts relevant to whether an offense counts as an aggravated felony must be established in the state proceeding." Gov't Br. 26. That argument attacks a straw man. Petitioner's position is that, when "convicted" is naturally read to apply to a particular fact and that natural reading would give the aggravated-felony category meaningful application, "convicted" should be read to apply to that fact. Nothing in *Nijhawan* casts the slightest doubt on that position. For the same reason, the Government's assertion that petitioner's position would create "uncertainties and anomalies" with respect to other aggravated felonies (Gov't Br. 36-38) is baseless. Petitioner's interpretation would have *no* effect on the provisions identified by the Government because they each parallel the

provision at issue in *Nijhawan*, not the distinct provision at issue here.

2. The Government's reliance on *Hayes* is similarly misplaced. There, the Court considered the meaning of a prohibition against possession of a firearm by a person who has been "convicted" of "a misdemeanor crime of domestic violence," which is defined as an offense that "has, as an element, the use or attempted use of physical force . . . committed by" a person who has a specified domestic relationship with the victim. 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9). The Court held that the statute describing the predicate offense of conviction must include as an element the use of force, but that the domestic relationship need not have been established in the prior conviction. The Court reasoned that Congress's use of the singular term "element" indicated Congress's intent to treat only the use of force as an element required to be determined in the earlier proceeding. *Hayes*, 129 S. Ct. at 1084. And the Court concluded that a contrary interpretation would have defeated Congress's intent because no federal offense treated the domestic relationship as an element, and only one-third of states had offenses treating the relationship as an element. *Id.* at 1085-88.

That analysis parallels the analysis in *Nijhawan*, *see* 129 S. Ct. at 2302 (relying on *Hayes*), and fails to support the Government's position here for the same reasons. As in *Nijhawan*, there was a specific textual indicator that the term "convicted" extends only to the first statutory factor and does not travel to the second. And that reading was necessary to give meaningful effect to the statute. Neither consideration applies here.

3. The Government equally errs in relying on *Rodriquez*. The statute considered in *Rodriquez* renders a state trafficking conviction a serious drug offense for purposes of the Armed Career Criminal Act if "a maximum term of imprisonment of ten years or more is prescribed by law" for the "offense." 18 U.S.C. § 924(e)(2)(A)(ii). The Court held that the "maximum term of imprisonment prescribed by law" for an "offense" takes into account a state's recidivism laws insofar as the defendant "faced the possibility of a recidivist enhancement." *Rodriquez*, 128 S. Ct. at 1788-89, 1791.

The statutory question in *Rodriquez* differs substantially from the one here. Instead of a requirement that the defendant be "convicted" of a "felony," the statute in *Rodriquez* required a "conviction" for an "offense." And instead of a requirement that the conviction constitute a felony under federal law, the statute in *Rodriquez* required a conviction of an offense as to which the defendant faced the possibility of a recidivist enhancement under state law.

To the extent it is relevant, however, *Rodriquez* supports petitioner. In explaining how to determine whether a defendant "faced the possibility of a recidivist enhancement" resulting in a sentence of 10 or more years of imprisonment, the Court pointed to four sources: (1) the defendant's actual sentence; (2) a judgment of conviction listing the maximum sentence; (3) a charging document containing the maximum sentence; and (4) a plea colloquy in which the judge states the maximum sentence. *Rodriquez*, 128 S. Ct. at 1791. Each of those sources involves documents in the proceeding giving rise to the relevant conviction. Conspicuously, the Court did not include the record of the defendant's *prior* conviction, the

document on which the Government seeks to rely here.

The Court's failure to list the record of a prior conviction cannot have been an oversight. Instead, it reflects the Court's determination that the fact of a defendant's prior conviction fails to show that he "faced the possibility of a recidivist enhancement," and that only the proceedings giving rise to the second conviction could establish that possibility. If the fact of a prior conviction fails to show that a defendant "faced the possibility of a recidivist enhancement," it necessarily fails to show that he was "convicted" of the "felony" of recidivist possession. Thus, far from supporting the Government's position, *Rodriquez* contradicts it.

II. A STATE POSSESSION CONVICTION CONSTITUTES FELONY RECIDIVIST POSSESSION UNDER THE CSA ONLY IF THERE WAS A PROSECUTORIAL CHARGE OF RECIDIVISM

The absence of a finding of recidivism by the convicting court itself suffices to establish that petitioner was not convicted of a felony punishable under the CSA. But petitioner's drug possession conviction fails to qualify as a conviction of a felony punishable under the CSA for the additional reason that there was no prosecutorial charge of recidivism.

A. The Statutory Terms Establish The Need For A Prosecutorial Charge Of Recidivism

1. The terms of 21 U.S.C. § 851 prescribe that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased pun-

ishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon." *Id.* § 851(a)(1). Under the plain language of that provision, in the absence of a prosecutorial charge of recidivism, a person convicted of possession shall not be sentenced to more than one year of imprisonment. *Id.* § 844(a). Such a conviction therefore is not "punishable" as a "felony" under the CSA. The Government has previously recognized as much, stating that "[a] drug possession offense is *punishable* as a felony under the Controlled Substances Act by virtue of the defendant's recidivism *only if* the government has filed a notice under 21 U.S.C. 851(a)." Brief for the United States in Opposition at 12, *Price v. United States*, 537 U.S. 1152 (2003) (No. 01-10940) (emphases added). The Government offers no reason to depart from that textual understanding here.

2. This Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1996), confirms that a prosecutorial charge of recidivism is necessary to show that a person with a prior drug conviction has been convicted of felony recidivist possession. In that case, the Court explained that an "enhanced penalty is not automatic," and "may not be imposed unless the Government files an information" under Section 851. *Id.* at 754 & n.1; *see* Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-27.300(B) cmt. (2002) ("Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 . . . as equivalent to the filing of charges."). The Court thus held that the presence or absence of a prosecutorial charge of recidivism de-

termines whether the "maximum term authorized" includes a recidivist enhancement. The Court explained that "for defendants who have received the notice under § 851(a)(1), . . . the 'maximum term authorized' is the enhanced term," but that "[f]or defendants who did not receive the notice, the unenhanced maximum applies." *LaBonte*, 520 U.S. at 759-60.

Under the Court's analysis in *LaBonte*, the maximum term authorized for a person convicted of drug possession in the absence a prosecutorial charge of recidivism is one year of imprisonment, while the maximum term authorized if the prosecutor charges a prior conviction is two years of imprisonment. *See* 21 U.S.C. § 844(a). *LaBonte* confirms that a person who commits drug possession and has a prior conviction for possession is punishable as a felon under the CSA only in the event the prosecutor elects to bring a charge of recidivism.

The Government attempts to distinguish *LaBonte* on the ground that the statute at issue in that case does not use the word "punishable." Gov't Br. 32 n.13. The Government, however, fails to explain why that should matter. If the "maximum term authorized" for an offense is one year of imprisonment, the offense is punishable as a misdemeanor, not a felony.

B. There Is No Merit To The Government's Arguments Against Requiring A Prosecutorial Charge

In arguing against conditioning the treatment of a state possession conviction as a felony on a prosecutorial charge of recidivism, the Government principally contends that Section 851's requirement of a

prosecutorial charge is "procedural." Gov't Br. 31. According to the Government, if a prosecutorial charge of recidivism is necessary for a state conviction to qualify as a felony punishable under the CSA, so too is every procedural requirement in Section 851. The Government's argument lacks merit.

As a matter of statutory text, Congress singled out a prosecutorial charge of recidivism by establishing that, absent fulfillment of that condition, "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions." 21 U.S.C. § 851(a)(1). Congress declined to attach that language to the fulfillment of any other requirement in Section 851. Accordingly, *LaBonte* specified a prosecutorial charge of recidivism as determinative of a defendant's maximum authorized term of imprisonment. *LaBonte* gave no other requirement in Section 851 the same status.

As the statutory text and the decision in *LaBonte* confirm, the requirement of a prosecutorial charge of recidivism serves a unique function. Unlike the other requirements in Section 851, the requirement of a prosecutorial charge embodies Congress's substantive judgment to refrain from exposing to felony punishment every convicted drug possessor with a prior conviction. Congress instead entrusted prosecutors with responsibility to exercise their judgment based on the circumstances of each case. The requirement of a prosecutorial charge therefore serves the purpose of separating recidivists who warrant felony treatment from those who do not. It would subvert the purpose of that requirement to treat every person convicted of drug possession and found by an IJ to have a prior conviction as having been

convicted of a felony punishable under the CSA.

Insofar as the Government suggests that requiring a prosecutorial charge of recidivism would unduly complicate the removal process, *see* Gov't Br. 32-34, the Government is mistaken. The Government would simply need to show that a state's recidivism law requires a prosecutorial charge of recidivism or produce a prosecutorial charge filed against the alien. If the Government is unable to do so, it will have failed to meet its burden to show that an alien was convicted of a felony punishable under the CSA. *See Rodriquez*, 128 S. Ct. at 1791.[2]

III. LENITY PRINCIPLES REQUIRE RESOLVING ANY AMBIGUITIES IN PETITIONER'S FAVOR

The text of the INA and other pertinent considerations establish that petitioner was not convicted of a felony punishable under the CSA. To the extent there is ambiguity on the matter, however, two rules of lenity apply. First, as the Government acknowledges, *see* Gov't Br. 50-51, the criminal rule of lenity applies because the INA uses terms from criminal statutes. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Second, there is a "longstanding principle of construing any lingering ambiguities in deportation

---

[2] For the reasons explained in petitioner's opening brief (at 29-34), a state conviction should be considered to qualify as a felony punishable under the CSA only if, in addition to a prosecutorial charge of recidivism, there was also an opportunity to challenge the validity of any charged prior conviction. While the latter requirement, unlike the requirement of a prosecutorial charge, lacks a textual specification establishing it as a precondition to a felony sentence, it too is an integral feature of Section 851.

statutes in favor of the alien." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). The Government questions that principle's applicability on the ground that Congress did not wish to give the benefit of the doubt to aliens. Gov't Br. 50-51 n.25. But Congress preserved for certain permanent resident aliens subject to removal an opportunity to apply to the Attorney General for discretionary cancellation of removal. 8 U.S.C. § 1229b. That provision reflects Congress's intent to give certain permanent resident aliens the benefit of the doubt. In any event, regardless of whether one or two principles of lenity apply, any ambiguity must be resolved in petitioner's favor.

Insofar as the text of the statute fails unequivocally to resolve this case in petitioner's favor, the statute is at least ambiguous. Suppose a person pleads guilty to drug possession under Section 844(a) in exchange for a prosecutor's agreement to abandon any charge of recidivism, and is then convicted based on that plea without any finding of recidivism by the court. If the question were asked whether that person has been convicted of a felony punishable under the CSA, the most straightforward answer is no: he has been convicted of misdemeanor drug possession, not the felony of recidivist possession. At the very least, however, the person could not be considered to have *unambiguously* pleaded guilty to a felony as defined by the CSA when the effect of his plea was to avoid any possibility of a felony sentence.

CONCLUSION

For the foregoing reasons, and those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: March 24, 2010

APPENDIX

APPENDIX

SAMPLE JUDGMENT

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Iowa

United States of America
v.
JUSTIN COLE

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER:
CR06-2046-001-MWB
USM NUMBER:
(USM Number)
Wallace L. Taylor
Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) which was accepted by the court. _____
- ■ was found guilty on count(s) after a plea of not guilty. **1 and 2 of the Superseding Indictment**

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§	Possession	05/02/2006	1

841(a)(1), 841(b)(1)(B), 851, and 860	**With Intent to Distribute 5 Grams or More of Crack Cocaine After Prior Felony Drug Conviction and Within 1,000 Feet of a Protected Location**		
21 U.S.C. §§ 844(a) & 851	**Possession of Marijuana After Two Previous Possession of Marijuana Convictions**	**05/02/2006**	**2**

The defendant is sentenced as provided in pages 2 through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____
- ■ Counts **remaining against the defendant in CR06-2046-001-MWB** are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special

assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 20, 2007
Date of Imposition of Judgment
/s/Mark W. Bennett
Signature of Judicial Officer
Mark W. Bennett
U.S. District Court Judge
Name and Title of Judicial Officer
12/28/07
Date

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 2 — Imprisonment

Judgment — Page 2 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **210 months. This term consists of 210 months on Count 1 and 36 months on Count 2 of the Superseding Indictment, to be served concurrently**.

- The court makes the following recommendations to the Bureau of Prisons:

It is recommended that he participate in the Bureau of Prisons' 500 hour Comprehensive Residential Drug Abuse Program.

It is recommended that he be designated to a Bureau of Prisons facility in Waseca, Minnesota; Oxford, Wisconsin; or in close proximity to his family, which is commensurate with his security and custody classification needs.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 — Supervised Release

Judgment Page
3 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **8 years. This term consists of 8 years on Count 1 and 1 year on Count 2 of the Superseding Indictment, to be served concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such

notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the U.S. Probation Office:

1. The defendant must participate in and successfully complete a program of testing and treatment for substance abuse.

2. The defendant is prohibited from the use of alcohol and is prohibited from entering bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

3. The defendant shall submit to a search of his or her person, residence, adjacent structures, office or vehicle, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable

suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; he or she shall warn any other residents that the residence or vehicle may be subject to searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 5 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$200**	**$0**	**$0**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $____$ $____$

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the
☐ fine ☐ restitution

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 — Criminal Monetary Penalties

Judgment — Page 6 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ■ Lump sum payment of $ **200** due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐C, ☐D, ☐E, or ☐F below; or

B ☐ Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ ____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ ____ over a period of _____(e.g., months or years), to commence _ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within __ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AMICUS CURIAE BRIEF

(10)

No. 09-60

Supreme Court, U.S.
FILED
FEB - 4 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICAN INSTITUTE, ASIAN PACIFIC AMERICAN LEGAL CENTER, BANISHED VETERANS, CATHOLIC LEGAL IMMIGRATION NETWORK, ET AL. IN SUPPORT OF PETITIONER

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CASA OF MARYLAND

COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES

DOMINICAN BAR ASSOCIATION

EL REFUGIO DEL RIO GRANDE

FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT

FLORIDA IMMIGRANT ADVOCACY CENTER

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

NATIONAL COUNCIL OF LA RAZA

NATIONAL IMMIGRATION LAW CENTER

NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS

NORTHWEST IMMIGRANT RIGHTS PROJECT

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STATEMENT OF INTEREST

Amici curiae are community groups, civil rights organizations, immigrant justice organizations and legal service providers whose members and clients face the severe consequences of applying the drug trafficking aggravated felony label to simple drug possession convictions.[1] As organizations that work closely with immigrants, their families and their communities, we have a profound interest in ensuring that their voices are included in the resolution of the legal issue in this case. This brief presents the stories of community members and clients whose lives will be touched by the Court's ruling. These stories will illustrate that the Fifth and Seventh Circuits' interpretation undermines Congress's graduated scheme of immigration consequences for drug-related conduct, and is contrary to Congress's intent that discretion should play a critical role in the removal process for those convicted of non-trafficking offenses.

Amici are comprised of the following organizations:

- Asian American Justice Center
- American Immigration Lawyers Association
- Asian American Institute

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[1] Amici state that no counsel for a party authored any part of this brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), amici curiae have filed the letters of consent with the Clerk of the Court.

- Asian Pacific American Legal Center of Southern California
- Banished Veterans
- CASA of Maryland
- Catholic Legal Immigration Network
- Coalition for Humane Immigrant Rights of Los Angeles
- Dominican Bar Association
- El Refugio del Rio Grande
- Florence Immigrant and Refugee Rights Project
- Florida Immigrant Advocacy Center
- Mexican American Legal Defense and Education Fund
- National Council of La Raza
- National Immigration Law Center
- Northern Manhattan Coalition for Immigrant Rights
- Northwest Immigrant Rights Project

Detailed statements of interest for each organization are appended after the conclusion of this brief.

SUMMARY OF ARGUMENT

The statutory provision at issue in this case is part of a broad regime enacted by Congress to create a graduated scheme of immigration consequences for drug-related conduct. While nearly all convictions related to the unlawful possession, sale or distribution of drugs trigger significant negative consequences under the immigration statute, Congress designated only a specific subset of those crimes as "drug trafficking" aggravated felonies that warrant the further penalty of barring eligibility for various

forms of discretionary relief, in addition to other harsh consequences. The stories of our community members and clients illustrate that the application of the drug trafficking aggravated felony label to simple possession convictions would result in mandatory removal of individuals for minor crimes or non-criminal dispositions. Amici argue that Congress did not view these convictions and dispositions as meriting such severe treatment.

Furthermore, Congress's statutory scheme contemplates a critical role for the exercise of discretion in order to ensure just outcomes in immigration proceedings. To receive relief, immigrants must first demonstrate their statutory eligibility, and if they are able to do so, can then present evidence of their equities to an immigration judge. Based on that individualized showing, the judge can decide whether or not a grant of relief is in the national interest. The stories of our community members and clients illustrate that the application of the aggravated felony label to individuals with simple possession convictions blocks immigration judges from exercising discretion in cases where Congress clearly intended that they do so.

Finally, while amici contend that the statute is clear, the Court should employ the rule of lenity in favor of the noncitizen to resolve any lingering ambiguities. The severe results imposed on our community members and clients demonstrate that a narrow construction of the statute is warranted.

BACKGROUND

The scope of the "drug trafficking" aggravated felony label affects thousands of our community mem-

bers, many of whom are lawful permanent residents or asylum seekers. These individuals have been convicted of drug possession convictions offenses that already render them removable. However, labeling their simple possession offenses as "drug trafficking" aggravated felonies would impose the additional penalty of barring them from discretionary relief from removal, among other severe consequences.[2]

Despite previous decisions by this Court and the Board of Immigration Appeals (BIA)—the Government's own agency entrusted to interpret and apply the immigration statute—limiting the "drug trafficking" label to exclude most simple possession offenses, the Fifth and Seventh Circuits have issued incorrect decisions to the contrary, widening the label's scope against Congress's intent. As this Background explains, Petitioner's case presents this Court with the opportunity to correct those interpretations, ensuring that the immigration statute's most severe consequences are not automatically visited upon immigrants convicted of simple possession offenses.

This Court has previously corrected an overly expansive interpretation of the scope of the "drug trafficking" aggravated felony term. In *Lopez v. Gon-*

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[2] The Immigration and Nationality Act defines "illicit trafficking in a controlled substance" as an aggravated felony, including in that definition any "drug trafficking crime" as defined in 18 U.S.C. § 924(c). 8 U.S.C. § 1101(a)(43)(B). 18 U.S.C. § 924(c) in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act," which is codified in 21 U.S.C. § 801 et seq. 18 U.S.C. § 924(c)(2). See *infra* Part I for further explanation of this application's effect on immigrants seeking relief from removal.

zales,[3] the Government argued that even one-time simple possession of a controlled substance could be deemed an aggravated felony. This Court rejected that position, holding that a simple possession conviction that is punishable as a misdemeanor under federal law could not be labeled a drug trafficking aggravated felony, even if the state classifies the offense as a felony. Recognizing that the statute's plain language places limits on the label's application, the *Lopez* Court noted that "[r]eading § 924(c) the Government's way...would often turn simple possession into trafficking, just what the English language tells us not to expect, [which] makes us very wary of the Government's position."[4] This Court's decision permitted many of our community members and clients to pursue discretionary relief, in accordance with Congress's intent.

However, even before *Lopez* the Government had argued that any second or subsequent simple drug possession offense is automatically a recidivist possession drug trafficking aggravated felony, regardless of whether the immigrant was convicted of recidivism in his or her state criminal proceedings. After *Lopez*, the Government sought remand for many petitions for review on this issue pending in the circuits while continuing to pursue its expansive reading of the statute in pending sentencing cases.[5] Our

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[3] 549 U.S. 47 (2006).

[4] *Id.* at 53 (2006).

[5] *Compare Bharti v. Gonzales*, No. 06-60383 (5th Cir. May 1, 2007) (Government successfully obtained remand post-*Lopez* based on assertion that BIA should address issue in immigration context) *with United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008) (noting and adopting Government's position

community members and clients continued to face bars to relief as this issue was litigated.

In 2007, the BIA addressed the issue in *Matter of Carachuri*, where they resoundingly rejected the improper expansion of the drug trafficking aggravated felony label in an en banc opinion.[6] Applying *Lopez*, the BIA concluded that for an immigrant's state simple possession convictions to warrant application of the drug trafficking aggravated felony label, the individual must have been convicted of recidivist drug possession under a statute that provided "notice and an opportunity to be heard on whether recidivist punishment is proper."[7] Noting that the Government itself was "troubled" by its previous litigation position, the BIA held that the immigration statute does not permit an immigration judge "to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that could have been prosecuted as a Federal felony."[8] Nonetheless, the agency concluded that it was bound to apply contrary circuit decisions on the issue in cases arising in those jurisdictions.[9]

The First,[10] Second,[11] Third,[12] and Sixth[13] Circuits have issued rulings agreeing with the BIA's in-

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that second or subsequent simple possession offense is aggravated felony in sentencing context).

[6] *Matter of Carachuri*, 24 I&N Dec. 382 (B.I.A. 2007).

[7] *Id.* at 391.

[8] *Id.* at 391, 393.

[9] *Id.* at 386.

[10] *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006).

terpretation on this issue, allowing our community members in those circuits to apply for and win discretionary relief. In the Fifth[14] and Seventh[15] Circuits, however, litigation on this issue in the sentencing context proceeded and these circuits held that second or subsequent possession offenses are automatically drug trafficking aggravated felonies. While these sentencing cases were decided without the benefit of considering the issue in the immigration context, the Fifth and Seventh Circuits then adopted their sentencing precedent in later immigration decisions.[16] As a result, our community members and clients whose cases are heard within the Fifth and Seventh Circuits face the harsh consequences of the drug trafficking aggravated felony label.[17]

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[11] *Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008).

[12] *Gerbier v. Holmes*, 280 F.3d 297, 300 (3d Cir. 2002); *Steele v. Blackman*, 236 F.3d 130, 136 (3d Cir. 2001).

[13] *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008).

[14] *Cepeda-Rios*, 530 F.3d at 333.

[15] *United States v. Pacheco-Diaz*, 506 F.3d 545, 550 (7th Cir. 2007).

[16] *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 266 (5th Cir. 2009); *Fernandez v. Mukasey*, 544 F.3d 862, 873 (7th Cir. 2008).

[17] See *infra* Part II for further discussion. Importantly, rulings in those circuits do not only apply to individuals who reside in those jurisdictions. Due to the system of detainee transfers, many individuals whose cases would have been decided under the law of other circuits are transferred to the Fifth in particular, where the Government's interpretation holds sway. *See* HUMAN RIGHTS WATCH, LOCKED UP AND FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 6 (2009) (noting Fifth Circuit receives the most detainees); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASE IN TRANSFERS OF ICE DETAINEES (2009),

This Court now has the opportunity to correct this misapplication of law and ensure that, in accordance with Congress's intent, the immigration statute's most severe penalties are not imposed on individuals with simple possession convictions.

ARGUMENT

I. Applying the drug trafficking aggravated felony label and its harsh consequences to our community members and clients who have been convicted only of simple possession undermines Congress's graduated scheme of consequences for drug offenses.

The immigration statute recognizes that some types of drug-related conduct are relatively minor in gravity, and thus do not warrant the same treatment as more serious drug-related crimes. Most individuals with drug-related offenses are deportable but eligible for discretionary relief. Only individuals convicted of "drug trafficking" aggravated felonies are subject to the statute's most severe consequences, including bars on most forms of relief. As the stories below illustrate, the Fifth and Seventh Circuit's interpretation undermines Congress's graduated scheme.

A. Under the statute, immigrants convicted of non-trafficking drug offenses are subject to removal but remain eligible for discretionary relief.

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http://trac.syr.edu/immigration/reports/220 (noting that in FY 2008, 52.4% of detainees were transferred).

The immigration statute states that any immigrant convicted of "a violation of...any law or regulation of a State, the United States, or a foreign country relating to a controlled substance...other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable."[18] The statute also makes "drug abusers and addicts" removable, which intuitively should include individuals who have possessed or used drugs multiple times.[19] Finally, a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance" renders an immigrant inadmissible to the U.S.[20] Therefore, individuals with more than one simple possession conviction are subject to deportability or inadmissibility on grounds other than "drug trafficking."

The statute ordinarily provides individuals convicted of drug-related offenses the opportunity to apply for various forms of discretionary relief. For example, cancellation of removal is a form of relief available to immigrants who have been lawful permanent residents for five years or more and have resided continuously in the United States for at least

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[18] 8 U.S.C. § 1227(a)(2)(B)(i).

[19] 8 U.S.C. § 1227(a)(2)(B)(ii).

[20] 8 U.S.C. § 1182(a)(2)(A)(II). The drug inadmissibility bar allows the government to put lawful permanent residents who travel abroad into removal proceedings when they attempt to return to the United States. Individuals who are put into proceedings in this fashion can also seek relief like cancellation. *See, e.g., Berhe*, 464 F.3d at 77 (describing lawful permanent resident who traveled abroad and was placed into proceedings when he attempted to re-enter).

seven years.[21] Immigrants who establish their eligibility may avail themselves of the opportunity to present positive equities to an immigration judge.[22]

Conviction of a drug trafficking aggravated felony automatically bars a lawful permanent resident from eligibility for cancellation.[23] None of the other broad drug-related grounds of removability, such as the controlled substance ground or "drug abuser or addict" ground, bar eligibility for relief *per se*. Treating simple possession offenses as grounds of removal, but not bars to relief, allows individuals convicted of minor offenses to present their equities. The stories of our community members and clients, such as Ms. Karen Alsol, demonstrate the importance of comporting with Congress's graduated scheme.

- Karen Nicola Alsol is a lawful permanent resident who emigrated from Jamaica to the United States over 16 years ago. She has significant family ties in the United States and has been consistently employed. Ms. Alsol was convicted of seventh degree possession of marijuana, the lowest level misdemeanor under New York law, on two separate occasions. She served a total of eight days of jail time for her offenses, which were her only two criminal convictions. Ms. Alsol successfully completed drug rehabilitation.

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[21] 8 U.S.C. § 1229b(a).

[22] *INS v. St. Cyr*, 533 U.S. 298, 307 (2001) (noting that "courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand.")

[23] 8 U.S.C. § 1229b(a)(3).

After being put into removal proceedings because of her possession convictions, an immigration judge granted her cancellation of removal in light of her positive equities. The government appealed, arguing that she was ineligible for relief. The Second Circuit ultimately rejected the government's argument and remanded her case to the BIA, which directed that her grant of relief be reinstated.

Since her proceedings concluded, Ms. Alsol has been pursuing her education. Inspired by her previous work as a home health aide caring for elderly individuals, she graduated in January 2010 with a medical assistant's certificate. She also married her U.S. citizen partner.[24]

B. Application of the drug trafficking aggravated felony definition to simple possession offenses imposes Congress's most severe consequences, including a bar to most forms of discretionary relief, on individuals convicted of relatively minor offenses.

While the immigration statute provides for the institution of removal proceedings for nearly all drug possession offenses, Congress reserved the statute's

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[24] *Alsol*, 548 F.3d at 207 (2d Cir. 2008); Oral Decision of Immigration Judge at 15, *In re Alsol*, A43 732 327 (New York Imm. Ct. Oct. 31, 2006); Letter from Maria Navarro, Supervising Attorney, Legal Aid Society to Alina Das, Supervising Attorney, Washington Square Legal Services (Jan. 25, 2010) (on file with Washington Square Legal Services).

most serious consequences for a set of crimes designated as "drug trafficking" aggravated felonies. Crimes in the latter category not only make a person removable, but also impose additional penalties. For example, conviction of a "drug trafficking" aggravated felony bars individuals from obtaining U.S. citizenship because they cannot meet the statutory requirement of demonstrating "good moral character."[25] Furthermore, the drug trafficking aggravated felony label triggers significant criminal sentencing enhancements.[26]

Furthermore, conviction of an aggravated felony bars eligibility for most forms of discretionary relief, such as asylum and cancellation of removal. Asylum is available to certain immigrants who cannot return to their sending countries because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[27] However, an indi-

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[25] 8 U.S.C. § 1427(a). A person with a drug possession conviction, other than a single offense of possession of less than 30 grams of marijuana, cannot demonstrate good moral character for a period of time of up to five years following the conviction. 8 U.S.C. § 1101(f)(3). Being convicted of an aggravated felony at any time after November 29, 1990 automatically and permanently bars an individual from establishing this requirement. 8 U.S.C. § 1101(f)(8).

[26] The immigration statute penalizes unlawful reentry into the United States following removal. 8 U.S.C. § 1326(a). The baseline sentence for this crime is a fine or imprisonment of up to two years, or both. 8 U.S.C. § 1326(a)(2). However, any individual who has unlawfully reentered the U.S. after being convicted of an aggravated felony faces up to 20 years in prison. 8 U.S.C. § 1326(b)(2).

[27] 8 U.S.C. § 1101(a)(42).

vidual convicted of a "particularly serious crime" is ineligible for asylum and an aggravated felony conviction is automatically classified as such a crime.[28] Thus, a person whose drug possession offense is deemed a drug trafficking aggravated felony is statutorily barred from presenting his or her case for relief.[29] The same bar applies to cancellation of removal.[30]

The Fifth and Seventh Circuits' rule treats even the most minor possession convictions as drug trafficking aggravated felonies. This injustice is emphasized by the fact that many of our community members with minor offenses, such as Mr. Martin Escobar, would be particularly strong candidates for discretionary relief because they can demonstrate that their positive equities outweigh their short criminal records.

- Martin Escobar is a lawful permanent resident who came to the United States almost 30 years ago and settled in the Chicago area. He worked as a tree trimmer to support his three

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[28] 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1158(b)(2)(B)(i).

[29] Conviction of an aggravated felony can also presumptively bar eligibility for other forms of persecution-based relief, such as withholding of removal, which is available to immigrants who can demonstrate either past persecution or that they are "more likely than not" to face persecution in their sending countries. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b)(1)(B)(iii); *see, e.g.*, *Bosede v. Mukasey*, 512 F.3d 946 (7th Cir. 2008) (Nigerian lawful permanent resident with simple possession convictions who applied for withholding).

[30] 8 U.S.C. § 1229b(a)(3).

> daughters as they attended high school and college. In the 1990s, Mr. Escobar was convicted of misdemeanor possession of marijuana and possession of a controlled substance. He never served jail time for either of these offenses, which are his only two criminal convictions. Eight years later, based on these convictions, an immigration judge found him ineligible for cancellation of removal based on his convictions. The Seventh Circuit dismissed his appeal and he was ordered removed. His wife and children remained behind in the United States, where they are doing their best to maintain mortgage payments on the family home Mr. Escobar purchased before he was deported.[31]

Many other clients and community members contend with the same barrier.[32] Barring such individu-

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[31] *Escobar v. Holder*, No. 08-3497 (7th Cir. Nov. 24, 2009); Brief for Petitioner for a Writ of Certiorari at 3–4, *Escobar v. Holder*, No. 09-203 (Aug. 17, 2009); Letter from Eleni Wolfe-Roubatis, Detention Project Supervising Attorney, Heartland Alliance's National Immigration Justice Center, to Alina Das, Supervising Attorney, Washington Square Legal Services (Feb. 1, 2010) (on file with Washington Square Legal Services) (hereinafter "NIJC Letter").

[32] *See, e.g.*, *Matter of Thomas*, 24 I.&N. Dec. 416, 417 (B.I.A. 2007) (60 days probation for one offense, fine for the other); *Matter of Elgendi*, 23 I.&N. Dec. 515, 516 (B.I.A. 2002) (time served and 6 month driver's license suspension for one offense, community service and driver's license suspension for the other); Certified Administrative Record at 8, *Lopez-Mendoza v. Holder*, No. 08-2916 (7th Cir. No. 25, 2009) (1 day jail time, probation and supervision for offenses); Brief of Petitioner at 3, *Garbutt v. Holder*, No. 08-4188 (7th Cir. Nov. 4, 2009) (probation and community service for both convictions).

als from discretionary relief collapses Congress's graduated scheme of consequences for drug-related conduct.

C. Application of the drug trafficking aggravated felony definition to simple possession offenses attaches these severe consequences even to non-criminal dispositions.

Treating simple possession offenses as "drug trafficking" aggravated felonies would attach the severe consequences of an aggravated felony conviction even to *non-criminal* drug offenses. For example, the Government has attached the aggravated felony label to dispositions under N.Y. Penal Law § 221.05, which punishes possession of a small amount of marijuana as a non-criminal violation and treats the offense similarly to a traffic infraction.

- Jerry Lemaine came to the United States when he was three years old and became a lawful permanent resident in 1996, at the age of 14. He grew up in the United States and finished high school. He spent his days training to become a nurse at the Hunter Business School Nursing Program and caring for his U.S. citizen sister, who suffers from hydrocephaly.

  Mr. Lemaine was charged with removability for two separate non-criminal violations under New York Penal Law § 221.05 for possession of a small amount of marijuana. He applied for cancellation of removal, asylum and relief under the Convention against Torture ("CAT"). Based on his two non-criminal violations, his

> request for cancellation of removal and asylum was pretermitted, his application for CAT relief was denied and he was placed in detention without the opportunity to seek release on bond.
>
> Mr. Lemaine has remained in detention for the past two and a half years, shuffled from one facility to another, thousands of miles from his home in New York. He currently awaits deportation to a country he has not seen since age three, a country that has recently suffered a great tragedy.[33] If sent back to Haiti, as a deportee with a criminal record, Mr. Lemaine will automatically be detained in a Haitian prison upon his arrival.[34]

As Mr. Lemaine's case illustrates, the government's position deems even an individual convicted of a *non-criminal* violation subject to removal without opportunity for relief. The extreme and absurd reach of the Fifth and Seventh Circuits' rule further highlights that applying the drug trafficking aggravated felony label to simple possession convictions would

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[33] While the government has announced that it is currently not deporting immigrants to Haiti in light of the recent earthquake, it has not stated that Haitian detainees will be released, nor does the announcement affect Mr. Lemaine's loss of legal status. *See* Department of Homeland Security, Statement by Deputy Press Secretary Matt Chandler (Jan. 13, 2010), http://www.dhs.gov/ynews/releases/pr_1263409824202.shtm (last visited Jan. 31, 2010).

[34] Brief for Petitioner at 4–9, *Lemaine v. Mukasey*, No. 08-60286 (5th Cir. Aug. 6, 2009). For another case involving non-criminal possession violations, see *Minto v. Mukasey*, 302 Fed App'x 13 (2d Cir. Dec. 5, 2008).

undermine Congress' graduated scheme of immigration consequences for drug-related conduct.

II. Application of the drug trafficking aggravated felony label to our community members and clients with simple possession offenses undermines Congress's intent that discretion play a critical role in ensuring just outcomes in removal proceedings that are based on non-trafficking offenses.

Discretion plays a crucial role in the two-step removal system described above. Generally, once immigrants who have non-aggravated felony offenses are found to be removable, an immigration judge can consider whether the individuals merit discretionary relief.[35] Based on this individualized determination, the judge can either grant relief or enter a removal order against the immigrant. The exercise of discretion is a crucial part of the system of immigration enforcement for those not deemed aggravated felons since it provides the only opportunity to balance the grounds of an individual's removal against the equities that weigh in favor of permitting him or her to remain in the United States.

In light of the development of the law on this issue in recent years, amici have witnessed the important role immigration judges' discretion has played in reaching fair and just outcomes for our community

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[35] *See, e.g.*, 8 U.S.C. §§ 1229b, 1229c (authorizing various forms of discretionary relief).

members and clients.[36] The absence of that discretion in the Fifth and Seventh Circuits demonstrates the harsh results of such a rule for individuals with compelling equities.

A. Under the Rule of the Fifth and Seventh Circuits, immigration judges have no choice but to order deportation of individuals with simple possession offenses regardless of compelling equities.

The immigration statute categorically bars most forms of discretionary relief for noncitizens convicted of a drug trafficking aggravated felony. Individuals convicted of simple possession cannot reasonably be understood to fall within such a severe bar. The stories of our community members and clients illustrate the injustice of subjecting individuals to removal without affording them the opportunity to demonstrate their equities, no matter how extraordinary they are.

1. Immigration judges who apply the Fifth and Seventh circuits' rule are barred from considering longstanding family and community ties to the United States.

Lawful permanent residents in particular have strong family and community ties to the United States, and subjecting these individuals to removal without the opportunity to seek relief would separate them from beloved family members who would re-

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[36] See *supra* Background.

main in the United States.[37] A significant number of noncitizens are members of families that include U.S. citizens, and they and their families have become deeply rooted in the United States over time. While exact data on family relationships is not available, Human Rights Watch has estimated based on the 2000 U.S. Census, that approximately 1.6 million spouses and children living in the United States have already been separated from their parent, husband, or wife because of deportations for criminal offenses.[38] If lawful permanent residents with simple possession convictions are labeled as drug traffickers, many more U.S. citizen children will be separated from their parents, and many more U.S. citizen parents will be separated from their spouses, regardless of the strength of these ties. The Ramirez-Solis family is but one example of the many families who are confronted with the emotionally wrenching and economically destabilizing ordeals that separation produces.[39]

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[37] *See* Michael Falcone, *100,000 Parents of Citizens Were Deported Over 10 Years*, N.Y. TIMES, Feb. 14 2009, at A16.

[38] HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 6 (2007), *available at* http://www.hrw.org/reports/2007/us0707/index.htm (last visited on Jan 31, 2009) (estimating that "at least 1.6 million family members, including husbands, wives, sons and daughters, have been separated from loved ones by deportations since 1997," approximately 540,000 of which were U.S. citizens by birth or naturalization).

[39] *See, e.g.*, *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (two U.S. citizen children, parents and siblings are citizens and LPRs); *Gerbier*, 280 F.3d at 300 (mother, brother and 3 U.S. citizen children); *Gonzales-Buitrago v. I.N.S.*, 5 F.3d

- Ruben Ramirez-Solis is a native of Mexico who arrived in the U.S. when he was three years old, and became a lawful permanent resident in 1987. He settled in Chicago, where he worked steadily to support his family. He has an extensive network of family in the United States, all of who are citizens or lawful permanent residents. Mr. Ramirez-Solis' wife is a lawful permanent resident, and they have three U.S. citizen children, all of whom are minors. His youngest daughter is nine years old.

  In 2002, Mr. Ramirez-Solis was twice convicted of possession of a controlled substance, after which he was detained and put into removal proceedings. Despite the fact that 25 family members, friends and employers submitted letters in support of his application for cancellation, he was deemed ineligible for relief. Mr. Ramirez-Solis has now been deported to Mexico, separated from the family and

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1495 (5th Cir. 1993) (U.S. citizen wife and daughter); *Gomez v. DHS*, No. 03-135 L, at *1 (D.R.I. 2003) (U.S. citizen grandparents, 2 U.S. citizen children, LPR mother and sisters); *Gomera v. Reno*, No. 00 Civ. 8731, at *1 (S.D.N.Y. 2000) (LPR mother and sisters, 2 U.S. citizen children); Petition for a Writ of Certiorari at 3, *Young v. Holder*, No. 09-733 (Dec. 21, 2009) (5th Cir. case involving LPR with U.S. citizen wife and 4 U.S. citizen children); Petition for Review of Decision of the Board of Immigration Appeals at 5, *Texeira Baptista v. Mukasey*, No. 08-60142 (5th Cir. Aug. 5, 2008) (U.S. citizen mother, LPR father, 3 U.S. citizen siblings, 1 U.S. citizen daughter); Reply Brief of Petitioner at 3–4, *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004) (No. 02-2538) (LPR wife, 7 U.S. citizen children).

community he built in the United States for the 30 years he lived here.[40]

Many other lawful permanent residents who have built their entire lives in the United States, like Mr. Rodriguez-Diaz, face deportation to countries they cannot even remember.[41]

- Oscar Rodriguez-Diaz immigrated to the U.S. in 1975 when he was six months old and became a lawful permanent resident when he was 14. He has lived almost his entire life in this country, residing in the Chicago area, and has no recollection of his brief time in Mexico. During his time in the United States he has been steadily employed and has been active in his local faith community. He also has extensive family ties in the country – he has an

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[40] Certified Administrative Record at 144, 150–153, *Ramirez-Solis v. Holder*, No. 08-3497 (7th Cir. Nov. 24, 2009); NIJC Letter.

[41] *See, e.g.*, *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (LPR since age 11); *Valenzuela-Zamarano v. Ashcroft*, 11 Fed.Appx. 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992) (LPR since age two); *Shurney v. INS*, 201 F.Supp.2d 783, 786 (N.D. Ohio 2001) (came to United States at age three); Brief for Petitioner at 4, *Minto v. Mukasey*, 302 Fed. Appx. 13 (2d Cir. Dec. 5, 2008) (No. 05-0007-ag) (came to U.S. at age eight); Brief and Required Short Appendix for Petitioners at 5, 8, *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (Nos. 06-3987, 06-3994, 06-3476) (describing two LPRs, one in United States since age nine, another in United States for over 40 years); *In re Collymore*, 2008 WL 4222241, at 1 (B.I.A. Aug. 28, 2008) (LPR since 1972); *In re Espinal*, 2008 WL 1734657, at 1 (B.I.A. Mar. 28, 2008) (LPR since 1973); *In re Flores-Gomez*, 2004 WL 2374449, at 1 (B.I.A. Jul. 27, 2004) (admitted to US in 1943).

eight year-old U.S. citizen daughter, a U.S. citizen mother, a lawful permanent resident father, and is engaged to a U.S. citizen.

Mr. Rodriguez-Diaz was convicted twice of possession of marijuana and once of another controlled substance possession offense. In addition to family and friends, his pastor submitted a letter stating Mr. Rodriguez-Diaz's value to the community. However, his simple possession offenses rendered him ineligible for relief. He was deported and separated from his family and community.[42]

2. Immigration judges who apply the Fifth and Seventh circuits' rule are barred from considering service in the U.S. military.

The United States has an interest in protecting its veterans and service members. The linguistic and cultural diversity noncitizens bring to the armed forces is especially valuable in the context of national security.[43] In recognition of the benefits that noncitizens can offer the military, the government has been expanding its recruitment of noncitizens.[44] There

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[42] Certified Administrative Record at 111, 117–121, *Rodriguez-Diaz v. Holder*, No. 08-3309 (7th Cir. Nov. 24, 2009); NIJC Letter.

[43] ANITA U. HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 1 (2005), *available at* http://www.cna.org/documents/D0011092.A2.pdf (last visited on Jan. 31, 2009).

[44] Gerry J. Gilmore, *Military Recruits Non-citizen Health Care Workers, Linguists*, AMERICAN FORCES PRESS SERVICE, Dec. 5, 2008, *available at*

are approximately 29,000 non-citizens serving in the U.S. military, with another 8,000 enlisting each year.[45] Moreover, thousands of immigrants have already served tours of duty in the U.S. military. More than 660,000 military veterans became citizens through naturalization between 1862 and 2000.[46]

Unfortunately, some war veterans struggle with drug addiction, especially those who have suffered from post-traumatic stress disorder ("PTSD") after returning home.[47] War veterans are diagnosed with PTSD at a higher rate than the general population.[48] "Survivors may turn to alcohol and drug abuse when they want to avoid the bad feelings that come with

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http://www.defense.gov/News/newsarticle.aspx?id=52208 (last visited on Jan 31, 2009).

[45] *Id.*

[46] HATTIANGADI ET AL., *supra* note 36 at 19.

[47] JOSEF I. RUZEK, PH.D., ET AL., U.S. DEP'T OF VETERANS AFFAIRS, NAT'L CTR. ON PTSD, TREATMENT OF THE RETURNING IRAQ WAR VETERAN, http://www.ptsd.va.gov/professional/pages/treatment-iraq-vets.asp#learning (last visited Jan. 31, 2010).

[48] JESSICA HAMBLEN, U.S. DEP'T OF VETERANS AFFAIRS, NAT'L CTR. ON PTSD, WHAT IS PTSD?: A HANDOUT FROM THE NATIONAL CENTER ON PTSD, *available at* http://www.ptsd.va.gov/public/pages/handouts-pdf/handout_What_is_PTSD.pdf (last visited Jan. 31, 2010). Hamblen notes that about 30 percent of Vietnam veterans are diagnosed with full PTSD and an additional 20 to 25 percent of Vietnam veterans have had partial PTSD at some point in their lives. Estimates of PTSD from the Gulf War are as high as 10 percent; the war in Afghanistan, between 6 and 11 percent. Current estimates of PTSD for those who served in Iraq range from 12 to 20 percent.

PTSD symptoms."[49] With treatment, these individuals are able to recover from their addiction and live drug-free lives.

Noncitizen veterans with simple drug possession convictions should not – contrary to Congressional intent – be categorized as drug traffickers and barred from discretionary relief.

- Praxedis Castro-Rodriguez has been a lawful permanent resident for 53 years and has lived continuously in the United States since he was five years old, when his parents emigrated from Mexico. Mr. Rodriguez has served honorably in the military and is a Vietnam War-era veteran. His wife and children are all U.S. citizens. He and his wife own their home and he has a solid history of employment.

  In 1984, Mr. Rodriguez was convicted of possession of marijuana and was placed on probation for 18 months. He was later convicted of possession of cocaine and given a suspended sentence of ten years probation.

  Mr. Rodriguez was placed in removal proceedings and denied the opportunity to seek cancellation of removal relief. Currently, his appeal is pending before the Fifth Circuit. Not only would deportation tear apart his family and require him to return to a country he barely remembers, but deportation would strip

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[49] EVE B. CARLSON, PH.D. AND JOSEF RUZEK, PH.D., U,S. DEP'T OF VETERANS AFFAIRS, EFFECTS OF TRAUMATIC EXPERIENCES: A NATIONAL CENTER FOR PTSD FACTSHEET, *available at* http://www.tema.ca/lib/Effects%20of%20Traumatic%20Experiences.PDF (last visited Jan. 31, 2010).

> him of the Social Security benefits he has contributed toward for decades and the attendant Medicare benefits for which he qualifies.[50]

The case of Praxedis Castro-Rodriguez is but one example of the impact of over-expanding the scope of the aggravated felony definition. Some estimates are that hundreds of veterans – perhaps even thousands – have been deported, and many of these deportations appear to be based on drug possession convictions.[51]

3. Immigration judges who apply the Fifth and Seventh Circuits' rule are barred from considering rehabilitation to overcome past addiction.

An immigrant in proceedings who has a criminal record will typically be required to present evidence of rehabilitation before discretionary relief is granted as a matter of discretion.[52] In addition to evidence of treatment and formal rehabilitation, "[t]he recency of a conviction and the fact of confinement are matters relevant to the consideration of whether an alien has demonstrated his rehabilitation and whether relief should be granted as a matter of discretion."[53] Non-

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[50] Brief for the Petitioner at 2, 4, *Castro-Rodriguez v. Holder*, No. 08-60343 (5th Cir. Sept. 30, 2009).

[51] *See* Pilar Marrero, *U.S. War Veterans Fight Deportation*, LA OPINION, Jan. 19, 2010, at 6.

[52] *Matter of C-V-T-*, 22 I&N Dec. 7, 12 (B.I.A. 1998).

[53] *Matter of Marin*, 16 I&N Dec. 581, 581 (B.I.A. 1978). While Marin dealt with a predecessor to cancellation, it still

citizens with simple possession offenses who have taken steps to overcome their past drug abuse should have the opportunity to present those factors to an immigration judge if they have not been convicted of drug trafficking. However, they are not able to do so under the Fifth and Seventh Circuits' rule.

- Juan Carlos Cortinovis, his parents and his two siblings came to the United States from Argentina as lawful permanent residents when he was only five years old. They settled in Northern California, where he lived for 44 years. He worked at an international technology company, working his way up from temporary employee status to a management-level position.

  In the midst of marital problems that eventually led to divorce, Mr. Cortinovis began using drugs and was convicted three times in 14 months for controlled substances offenses. He stopped using substances and rebuilt his life. He made amends with his family, particularly his two teenage U.S. citizen daughters. He developed a very close relationship with them, never missing a single weekly visit, even when they moved 80 miles away with their mother. He regularly made the three-hour roundtrip drive to watch their basketball games during the week.

  Mr. Cortinovis has stayed off drugs since his last conviction and has not been charged with any more crimes. He moved into his parents'

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remains applicable to cancellation per *Matter of C-V-T-*, 22 I&N Dec. at 11.

home to help his elderly mother take care of his father, who was dying from lung cancer. He remained there for eight years, including four years after his father passed away.

However, nine years after his last conviction, ICE officers arrested Mr. Cortinovis at his home in California, then transferred to him to Texas. There, he was deemed ineligible for cancellation under Fifth Circuit precedent and was deported. He left behind his entire family in California, including a long term U.S. citizen girlfriend who he hoped to marry one day.[54]

- Barrington Morgan-White first entered the U.S. in 1981 with his family when he was eight years old. In 1988 he became a lawful permanent resident and remained in the United States until he was deported to Nicaragua. Mr. Morgan-White graduated from high school with more than a dozen academic and athletic awards. He worked continuously for various state agencies in Texas for almost ten years while he helped to support his family and completed certificate programs in a local community college. His U.S. citizen mother, who suffers from terminal malignant melanoma, his four sisters and all of his extended family members live in the United States.

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[54] Respondent's Motion for Remand to the Immigration Judge for Change of Venue Based on Ineffective Assistance of Counsel, at 4-9, *In re Cortinovis*, A014-707-441 (Falls Church Imm. Ct. Aug. 22 2009).

Mr. Morgan-White was convicted twice of attempted possession of less than one gram of cocaine. Mr. Morgan-White completed drug treatment programs and had a strong support network in Texas that facilitated his rehabilitation. About a dozen family members and former co-workers submitted letters of support for his cancellation of removal application. Nevertheless, his application for relief was pretermitted because the second drug offense was deemed to be an aggravated felony under the Fifth Circuit rule. The Fifth Circuit denied his appeal, and Mr. Morgan-White was deported to Nicaragua. His deportation has imposed great hardship on his family, particularly for his dying mother, who most needs his support.[55]

4. Immigration judges who apply the Fifth and Seventh Circuits' rule are barred from considering the positive equities of asylum seekers who face serious threats of persecution and discrimination in their sending countries.

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[55] *Morgan-White v. Holder*, No. 08-60586 (5th Cir. Dec. 15, 2009); Application for Cancellation of Removal for Certain Permanent Residents, Respondent's Brief on Appeal at 2, *In re Morgan-White*, A90-395-622 (San Antonio Imm. Ct. June 4, 2008).

Mr. Lemaine's[56] asylum application was pretermitted due to the automatic bundling of his discrete non-criminal violations into a drug trafficking aggravated felony.[57]

- Mr. Lemaine has been detained in Texas for the past two and a half years awaiting deportation to Haiti due to the erroneous Fifth Circuit decision under review in this case. If he is removed, as a deportee with a criminal record, Mr. Lemaine will be detained indefinitely in a Haitian prison upon his arrival in Haiti and will likely face life-threatening conditions.[58] The U.S Department of State has documented the horrific prison conditions in Haiti.[59] No medical care is provided to the detainees in Haiti. Physical abuse by guards is pervasive. The Department of State has cited beating with fists, sticks, and belts; burning with cigarettes; choking; hooding; and "kalot marassa" (a severe boxing of the ears) as some of the forms of abuse against detainees that are rampant in Haiti.[60] It has also documented

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[56] *See supra* Part I.C. for a more detailed discussion of Mr. Lemaine's story.

[57] *See also Berhe*, 464 F.3d at 78–79 (involving Eritrean national who faced religious persecution if he were returned to sending country); *In re Haile-Mariam*, 2007 WL 4182339, at 2 (B.I.A. Oct. 22, 2007).

[58] Brief for Petitioner at 4–9, *Lemaine v. Mukasey*, No. 08-60286 (5th Cir. Aug. 6, 2009).

[59] *Id.*, citing the BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES-2002: HAITI at 252, 352 (2007).

[60] *Id.*

isolated allegations of torture by electric shock.[61] These life-threatening conditions have severely worsened after the tragic earthquake in Haiti.[62]

B. In jurisdictions that have accepted the BIA's interpretation, immigration judges have exercised discretion to provide immigrants with non-trafficking convictions relief based on compelling equities, as Congress intended.

In jurisdictions that recognize that a second simple possession offense should not automatically be deemed an aggravated felony, immigration judges have exercised discretion in cases involving core U.S. interests and values such as fairness, proportionality and family unity.[63]

- Donald Overton Powell is a 60-year-old lawful permanent resident who arrived in the United States from Jamaica as a teenager over forty years ago. His mother and brother are U.S. citizens, and his two sisters are also lawful permanent residents. He has two U.S. citizen

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[61] *Id.*

[62] *See* Simon Romero, *Haiti Lies in Ruins: Grim Search for the Untold Dead*, N.Y. TIMES, Jan. 14, 2010 at A1.

[63] *In re Louisiaire*, 2008 WL 762757, at 1 (B.I.A. Feb. 28, 2008); *In re Saladrigas-Vergara*, 2008 WL 655766, at 1 (B.I.A. Feb. 7, 2008); *In re Beckford*, 2008 WL 339649, at 1 (B.I.A. Jan. 15, 2008); *In re Sandoval-Castillo*, 2006 WL 2391183, at 1 (B.I.A. Jun. 27, 2006); *In re Williams*, 2005 WL 3833033, at 1 (B.I.A. Nov. 17, 2005); *In re Jimenez*, 2005 WL 3016098, at 1 (B.I.A. Aug. 5, 2005).

children and two grandchildren, whom he helps care for on a regular basis. His life in the United States has been marked by tragedy. For 15 years, he worked at a paper factory, where the inhalation of paper dust caused serious illness that required surgery. During this time, his father was shot and killed by a stray bullet.

Mr. Powell was convicted in 1997 and 2001 for misdemeanor possession of a controlled substance. Since those convictions, he has remained free of drugs, stating "he cannot do drugs and take care of his grandchildren." In light of his equities, an immigration judge granted him cancellation of removal. However, the Government appealed this determination and eventually Mr. Powell's case went to the Second Circuit, where his case was joined with Ms. Alsol's.[64] Following the Circuit's favorable decision, he is awaiting remand on his case so that his cancellation can be reinstated. In the meantime, he continues to maintain his connection to his family by helping care for his grandchildren.[65]

Immigration judges have also exerted discretion to uphold the longstanding humanitarian principles underlying the purpose of relief. The cases of Gary Anderson and Ancil Skeete illustrate the crucial role of discretion in ensuring fair outcomes in the immigration system.

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[64] Ms. Alsol's case is described *supra* Part I.A.

[65] Petitioner's Brief at 5–7, *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (No. 08-1112 ag).

- Gary Patrick Anderson is a lawful permanent resident who has lived in the United States since 1984 at the age of 17. He has significant family ties in the Unites States, including two U.S. citizen siblings, a number of nieces and nephews, and a mother and brother who are lawful permanent residents. Mr. Anderson is diagnosed with mental illness and mental retardation, and for years suffered through lengthy hospitalizations. However, he began exhibiting marked improvement after connecting with a community-based treatment provider that could address his mental health, substance abuse and housing needs.

  In the 2000s, Mr. Anderson pled guilty to two possession offenses. After his second plea, he was detained by Immigration and Customs Enforcement (ICE) and transferred to a facility in Texas, separated from his family and the support networks that were so crucial to his mental stability. He remained in detention for over two years, despite psychological evaluations finding that he was a limited flight risk, affidavits from relatives and psychiatrists, and no fewer than 98 letters of support from community members. His treatment providers eventually secured him counsel, who persuaded an immigration judge to transfer his case back to New York. He was finally granted cancellation of removal in early 2009 and was released from detention.[66]

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[66] Memorandum of Law in Support of Petitioner's Habeas Corpus Pursuant to 28 U.S.C. § 2241 at 5–15, *Anderson v. McGuire*, No. 2:09-cv-00340-DMC (D.N.J. Jan. 23, 2009); *DHS*

- Ancil John Darren Skeete is a lawful permanent resident who was born in Trinidad but immigrated to the U.S. over 30 years ago, when he was 12 years old. He has strong family ties to the Unites States, including his mother, stepfather and fiancée. Mr. Skeete also stays in regular contact with his 18-year-old son, who was adopted by another family but remains in his life. Mr. Skeete is diagnosed with HIV and manages a complex medication regimen in order to maintain his health.

  Mr. Skeete has been convicted twice of misdemeanor possession of controlled substances and once of misdemeanor possession of marijuana. He was kept in detention in Texas pending the resolution of his removal proceedings. He was initially barred from applying for both asylum and cancellation of removal because his possession conviction was deemed to be a drug trafficking aggravated felony. After his attorneys filed a successful motion for change of venue and his case was transferred back to New York, he finally received cancellation and was released from detention after 26 months.[67]

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v. Anderson – Center for Constitutional Rights, http://ccrjustice.org/ourcases/current-cases/dhs-v.-anderson (last visited Jan. 31, 2010).

[67] *See* Memorandum of Law in Support of Petitioner's Habeas Corpus Petition Pursuant To 28 U.S.C. § 2241 at 4-9, *Skeete v. Shanahan*, No. 1:09-cv-0523-RJH (S.D.N.Y. Jun. 4, 2009).

These cases are but a few examples of numerous individuals who have received discretionary relief based on their equities, who would be denied such relief under the Fifth and Seventh Circuits' interpretation.[68]

III. Given the harsh results for immigrants, any ambiguities regarding Congressional intent in the statute should be interpreted in favor of the noncitizen under the rule of lenity.

Amici first and foremost agree with the Petitioner that there is no ambiguity in the plain language of U.S.C. § 1101(a)(43)(B).[69] The statute cannot be read to automatically label any second or subsequent simple drug possession offense as a drug trafficking aggravated felony.

However, as Petitioner's brief discusses, should the Court conclude that U.S.C. § 1101(a)(43)(B) is ambiguous, any such ambiguity should be construed in favor of the noncitizen given the tremendously harsh immigration consequences faced by individuals with aggravated felony convictions.[70] The rule of len-

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[68] *See also* Certified Administrative Record at 2, *Beckford v. Holder*, No. 08-1355 (7th Cir. Nov. 24, 2009) (individual who received cancellation of removal, but was held ineligible for relief after Government's appeal); *In re Lousiaire*, 2008 WL 762757, at 1 (B.I.A. Feb. 28, 2008) (same).

[69] *See* Br. for Pet'r at 17.

[70] *Id.* at 38–40. The rule of lenity applies in the criminal context just as it applies in the immigration context. As mentioned *supra* Part I.B, immigrants who unlawfully reenter the United States after being convicted of an aggravated felony are subject to up to 20 years in prison, 8 U.S.C. § 1326(b).

ity applies with special force where it results in an interpretation of an underlying statute that is consistent with that statute's "humanitarian purpose."[71] The discretionary forms of relief set forth in the statutes authorizing asylum and cancellation of removal were built upon humanitarian principles that have saved the lives of many individuals fleeing from persecution and protected the integrity of countless of families. Validating the Fifth and Seventh Circuits' harsh rule undermines principles of proportionality and would be a step backward for human rights.

Amici have witnessed firsthand how the separation of spouses and children living in the United States from their parent, husband, or wife because of deportations has a particularly harmful effect on low-income families who lack resources. Removal may mean the withdrawal of financial support from the household breadwinner. Furthermore, these families may not have the economic means to take their children to visit their noncitizen parents or family members who have been deported. Therefore, removal creates severe emotional and financial difficulties for families.[72] Nir Masok's story is but one example.

- Nir Masok is an Israeli national who entered the United States in 1982 at the age of 13 and became a lawful permanent resident five years later. He has worked steadily for his father's catering company since 1994. Mr. Masok lives in Illinois with his U.S. citizen fiancée and her

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[71] *INS v. Errico*, 385 U.S. 214, 225 (1966) (interpreting INA provision saving noncitizens who obtained entry through misrepresentation from deportation under certain conditions).

[72] *See also* FORCED APART, *supra* note 31 at 44.

> two U.S. citizen sons who are ten and eleven years old; the latter has been diagnosed with an emotional disorder and Mr. Masok plays a major role in caring for him. His parents and sister are also U.S. citizens.
>
> In the past, Mr. Masok had a drug abuse problem and was convicted several times of simple drug possession. After his last conviction in 2002 for misdemeanor possession of marijuana, he successfully completed drug rehabilitation after seeing the effects his drug use had on his family. He has not used drugs in seven years and has not been convicted of drug-related offenses since his 2002 conviction. However, he now faces removal without opportunity for relief because of his drug possession convictions under Seventh Circuit law, and his family is concerned about the effect his deportation would have on his fiancée's older son, who already requires significant attention and care.[73]

The Masok family is not alone. Labeling simple possession offenses – some of which are treated as non-criminal violations – as aggravated felonies would tear apart many families, as was the case of the Ramirez-Solis and Rodriguez-Diaz families. This interpretation implicates life and death issues, as in

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[73] See *Masok v. Achim*, No. 04C7503 (N.D.Ill. Apr. 28, 2005); Respondent's Pre-Hearing Statement, Memorandum of Law in Support of Application for Cancellation of Removal at 2, and Affidavit of Stephanie Graves in Support of Respondent's Pre-Hearing Statement at 3–5, *In re Masok*, A38-686-189 (Chicago Imm. Ct. Mar. 2, 2009).

the case of Mr. Lemaine. It would mean denying U.S. veterans such as Mr. Castro-Rodriguez the care and opportunity that they were promised when they took an oath to serve our country. And it forces the legal system to turn its back on individuals, such as Mr. Cortinovis and Mr. Morgan-White, who have overcome addiction and transformed their lives and those of their families and communities. These are precisely the harsh consequences against which the rule of lenity is meant to protect.

Applying the principles affirmed by this Court to the present case, the narrowest construction of 8 U.S.C. § 1101(a)(43), and the one consistent with the rule of lenity, does not construe "drug trafficking" to include simple possession, so as to elevate possession into an aggravated felony.

CONCLUSION

The stories of the community members and clients described in this brief demonstrate the harsh consequences that application of the "drug trafficking" aggravated felony label to simple possession offenses would inflict on individuals who should remain eligible for discretionary relief. Amici respectfully urge this Court to consider the unjust impact that this interpretation has on the immigrant communities we represent and find in favor of the Petitioner in this case.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The **Asian American Justice Center** ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Collectively, AAJC and its affiliates – the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California – have over fifty years of experience in litigation, public policy, advocacy, and community education on discrimination issues. AAJC has advanced its long-standing concern for protecting the rights of immigrants – a significant proportion of whom are Asian Americans – by filing briefs in immigration cases, and educating policymakers and the public on the need for fair and humane immigration laws.

Founded in 1946, the **American Immigration Lawyers Association** ("AILA") is a national non-profit association of over 11,000 attorneys and law professors who practice and teach in the field of immigration and nationality law. AILA works to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice in the United States. AILA member attorneys represent tens of thousands of immigrant families and regularly appear before federal courts throughout the United States.

Asian American Institute ("AAI") is a pan-Asian, non-partisan, not for profit organization lo-

cated in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. AAI's programs include legal advocacy, community organizing, and leadership development. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. AAI strives to put a human face on the challenges that immigrants experience and, accordingly, has an important interest in the fairness of criminal and other proceedings against immigrants. Mandating unduly harsh consequences for simple drug possession convictions, as the Fifth and Seventh Circuits have done, is unfair to immigrants and their families and violates applicable principles of law.

The **Asian Pacific American Legal Center of Southern California** ("APALC") was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work include workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC employs policy advocacy and case work to represent the interests and due process rights of individuals who could be repatriated and removed from the country. It is in this interest that we participate with amici in this brief.

Banished Veterans was founded to advocate for all members of the U.S. Military who serve of have served our nation and who face deportation or have been deported due to harsh immigration consequences. Veterans who have served during times of war or hostilities often lack a real opportunity to seek any form of discretionary relief due to the current erroneous interpretation of Congress' intent in the Fifth and Seventh Circuits. In our experience, this creates an injustice to these long-term permanent residents and has the potential to adversely affect national security. Therefore, Banished Veterans has a direct interest in the issues in this case.

CASA of Maryland is a non-profit agency founded in 1985 that provides multiple services including immigration assistance, employment rights legal representation, employment training and job placement, leadership training, and education to the immigrant and refugee community in Maryland. In addition to providing direct services, CASA organizes domestic workers and women, day laborers, and tenants to work together to build better neighborhoods and stronger communities. CASA also actively involves community members in advocacy efforts that include comprehensive immigration reform. CASA is an active member of the National Capital Immigration Coalition.

The **Catholic Legal Immigration Network, Inc.** ("CLINIC") is a non-profit organization comprised of 185 diocesan and other affiliated immigration programs with 290 field offices in 48 states. Its mission is to enhance and expand delivery of legal services to indigent and low-income immigrants, principally through diocesan immigration programs

and to meet the immigration needs identified by the Catholic Church in the United States. In recent years CLINIC affiliates and CLINIC's BIA Pro Bono Project have assisted hundreds of immigrant detainees in removal proceedings, including immigrants with minor drug-related offenses.

The **Coalition for Humane Immigrant Rights of Los Angeles** ("CHIRLA") is a nonprofit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of the issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to more effectively advocate for positive change.

The **Dominican Bar Association** ("DBA") works to increase professional opportunities for Dominican-American, native Dominican and Latino attorneys in the U.S. legal profession and to partner with other bar associations, governmental agencies and community groups to foster greater participation in the U.S. legal system by the Dominican and Latino communities. The DBA also addresses issues of concern to the Dominican and Latino communities in the U.S. and safeguards the civil rights of the Dominican and Latino communities and to empower said communities to fully participate in American society through public education and outreach.

El Refugio del Rio Grande, Inc., is a §501(c)(3) organization devoted to furthering the rights of asylum-seekers and other immigrants. Recently, Refugio has focused increasingly on the impact of the 1996 amendments to the Immigration and

Nationality Act on lawful permanent residents and their families. Since their enactment, Refugio has represented well over 100 such clients in the federal district courts, Fifth Circuit, and Supreme Court, and many others before the Executive Office for Immigration Review.

The **Florence Immigrant and Refugee Rights Project** ("Project") is a Legal Orientation Program site of the Executive Office of Immigration Review. As such, it is one of more than 25 organizations across the country providing free legal information to detained citizens and non-citizens in removal proceedings. In 20081, nearly 10,077 individuals charged with removability observed a rights presentation given by Project attorneys. That same year, more than 3,342 people received targeted pro se support services from the staff. Every year, Florence Project attorneys directly represent approximately 50 Respondents before the Board of Immigration Appeals and support countless pro se appellants.

The **Florida Immigrant Advocacy Center** ("FIAC"), a non-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy and education. For more than a decade, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit.

The **Mexican American Legal Defense and Education Fund** ("MALDEF") is a national civil

rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. MALDEF is at the forefront of the battle to create and preserve the rights of those in search of economic opportunity and personal freedoms in America.

National Council of La Raza ("NCLR") is a private non-profit organization and the largest Latino constituency-based advocacy group in the United States. NCLR has nearly 300 member organizations in forty states. Founded in 1968, its mission is to reduce poverty and discrimination, and to improve opportunities for Latinos throughout the United States. It carries out its mission by focusing its education and advocacy work on issues related to education, economic development, electoral empowerment, healthcare, civil rights, and immigration.

The **National Immigration Law Center** ("NILC") is a national nonprofit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure that the government treats immigrants with fairness and due process. NILC has a direct interest in the issues in this case.

Northern Manhattan Coalition for Immigrant Rights ("NMCIR") was founded in 1982 as a community response to the influx of immigrants settling in Northern Manhattan and the Bronx. Every year NMCIR helps keep thousands of immigrant families stay together by providing free and affordable, personalized support around a vast array of family-based immigration petitions. NMCIR also helps the immigrant community build visibility and political power via voter registration, civic education, and supporting its member-driven advocacy campaigns around deportation issues.

Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants in removal proceedings both before the Executive Office for Immigration Review and before the federal courts of appeals. A central goal in NWIRP's work before the Federal Courts of Appeals is to help clarify general tenets of the law so that other persons in proceedings, both represented and unrepresented, may benefit from a clear set of rules implementing the Immigration & Nationality Act. Accordingly, NWIRP has a direct interest in the issues in this case.

AMICUS CURIAE BRIEF

No. 09-60

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,

Petitioner,

—v.—

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law ("the Center") respectfully submits this brief in support of Petitioner Jose Angel Carachuri-Rosendo.[1] The Center, based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy, and particularly focuses on prosecutorial power and discretion. In general, the Center's litigation practice concentrates on cases in which exercises of prosecutorial discretion raise significant substantive legal issues. A primary guiding principle in selecting cases to litigate is to identify cases in which prosecutors exercised discretion to engage in overaggressive or unwarranted interpretations of the Constitution, statutes, regulations, or policies in a way that diverges from standard practices, raises fundamental questions of defendants' rights, or is a misuse of government resources in light of law enforcement priorities. The Center also defends exercises of prosecutorial discretion where the discretionary decisions comport with applicable law

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[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the Center or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

and standard practices and are consistent with law enforcement priorities.

The Center's appearance as *amicus curiae* here is prompted by its concern that allowing immigration courts to supplant prosecutorial discretion exercised in a measured and consistent manner will undermine the fair and efficient administration of the criminal justice system. Thus, this case is an important one to the Center's mission.

SUMMARY OF ARGUMENT

Allowing immigration courts to deem an individual an aggravated felon for purposes of the immigration laws when that individual was neither charged nor convicted as a recidivist in the underlying state criminal proceeding impedes the proper administration of the criminal justice system by undermining the considered discretion of state prosecutors. The decision of the Fifth Circuit, like the prevailing rule in the Seventh Circuit but unlike that in the First, Second, Third, and Sixth Circuits and the Board of Immigration Appeals, permits immigration courts to treat a second or subsequent possession misdemeanor offense as a recidivist felony despite a state prosecutor's choice to decline such a charge.[2] In so holding, the Fifth Circuit's

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[2] *Compare Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008), *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008), *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), *and In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (BIA 2007), *with Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) *and Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008).

decision contravenes the considered charging decisions of state prosecutors acting consistently with the broad discretion afforded them under the law. *Amicus* urges this Court to reverse the decision below for three principal reasons.

First, the Fifth Circuit's disregard for the exercise of prosecutorial discretion ignores this Court's recognition that "the decision to prosecute is particularly ill-suited to judicial review," because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Because prosecutorial discretion plays a crucial role in the interplay between prosecutors, courts, and legislatures to ensure fair and equitable application of the criminal laws, interfering with such discretion prevents the appropriate actors in the criminal justice system from ensuring that charges and sentences are tailored to the circumstances of the particular individual. Indeed, state and federal legislatures often design punishment schemes to account for the exercise of prosecutorial discretion, recognizing that such exercise will mitigate what otherwise could be unduly harsh punishments. The government's characterization of section 851's requirements as merely "procedural" inappropriately denigrates the critical role that prosecutorial discretion plays in determining appropriate punishments for misdemeanor recidivists under federal law. Further,

encroaching upon prosecutorial discretion creates uncertainty about the consequences of convictions, undermining prosecutors' ability to secure plea dispositions. Countermanding prosecutorial discretion also compromises prosecutors' ability to secure the cooperation of offenders necessary for the disposal of cases, thereby impeding the proper punishment of the most culpable offenders.

Second, this Court should reverse the decision below to address not only the basic disrespect afforded the states' administration of their criminal justice systems inherent in the Fifth Circuit rule, but also the unwarranted disparity created between defendants convicted in state versus federal courts. When a federal immigration court interferes with the administration of state criminal justice systems in this fashion, it upsets the appropriate balance between state and federal interests. Because states play a primary role in defining and enforcing their criminal laws, and state prosecutors bring the vast majority of criminal prosecutions in the United States, encroaching upon state prosecutors' charging decisions while potentially leaving similar decisions of federal prosecutors undisturbed not only demonstrates disrespect for state actors, but has far-reaching implications for the criminal justice system. Indeed, in practice, federal prosecutors virtually always exercise their discretion to decline to bring a recidivist drug charge under 21 U.S.C. §§ 844 & 851—in 2007, only three reported felony convictions included a record of a filed section 851 information. Allowing an immigration court to disregard completely a state prosecutor's decision similarly to decline a recidivist charge would create a vast and

very real disparity in the treatment of state and federal offenders.

Finally, this Court should reverse the decision below because the scheme set forth by the Fifth Circuit creates the risk that a defendant's Sixth Amendment right to a jury trial may be violated, depending upon where removal proceedings are initiated.

Given the importance of these issues to the fairness and equity of the criminal justice system and the uncertainty that the Fifth Circuit's decision engenders for that system, *amicus* urges this Court to reverse the decision below.

ARGUMENT

I. This Court Should Reverse the Fifth Circuit's Decision Because It Improperly Interferes with the Basic Exercise of Prosecutorial Discretion with Respect to Charging Decisions.

As this Court has recognized, prosecutorial discretion "is an integral feature of the criminal justice system," *United States v. LaBonte*, 520 U.S. 751, 762 (1997), and "[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion," *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to

judicial review," because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict ... [is] a decision which has long been regarded as the special province of the Executive Branch ....").

The Fifth Circuit's decision fundamentally contravenes this integral feature of the criminal justice system by allowing immigration courts to supplant, after the fact and without the requisite experience or perspective, the considered charging decisions of prosecutors acting within the proper discretion afforded them under the law. If left standing, the decision not only would undermine the vital role prosecutorial discretion plays in ensuring the fair and efficient administration of the criminal justice system, but also would result in a system that ignores the explicit role that discretion plays in the specific statutory scheme at issue.

A. The Prosecutor's Exercise of Discretion Is a Critical Tool Used To Achieve Important Policy Goals and Should Not Be Undermined.

The decision of the Court of Appeals would allow immigration judges—who lack the requisite perspective and knowledge of the facts and

circumstances that inform the decisions of prosecutors, plea allocution judges, and sentencing judges—to interpose their judgment in contravention of the considered collective judgment of the myriad players in the criminal justice system. As the Board of Immigration Appeals ("BIA") itself cautioned in Petitioner's proceedings, "the hypothetical approach would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that could have been prosecuted as a Federal felony." *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (BIA 2007). Such interference disturbs the efficient and fair administration of the criminal justice system: *first*, by contravening prosecutors' proper role in ensuring the equitable enforcement of the criminal laws through the exercise of their charging discretion, which is particularly important in the context of recidivism cases; *second*, by creating uncertainty about the consequences of convictions and thus undermining prosecutors' critical ability to secure plea dispositions; and *finally*, by compromising prosecutors' ability to secure cooperation of witnesses to ensure the proper punishment of the most culpable offenders.

First, the exercise of prosecutorial discretion is a key mechanism within the criminal justice system by which punishment is calibrated to fit the characteristics of the specific offense and offender. This Court has recognized that legislatures face "practical difficulties in drawing criminal statutes both general enough to take into account a variety of

human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). As a result, many criminal offenses are enumerated in "statutes that are ill-defined, overbroad, or insufficiently concerned with culpability," while other offenses are found within "[s]tatutes prohibiting appallingly destructive conduct [that] are jumbled together with others prohibiting relatively minor violations of social mores." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2137 (1998). Given this reality, prosecutorial discretion, particularly in favor of leniency, "is widely seen as necessary, and frequently as a good thing: It permits mercy, and it avoids flooding the system with low-level crimes." William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000). Indeed, because "[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case," "'leniency' has ... become not merely common but a systemic imperative." SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 1006 (8th ed. 2007).

For example, the U.S. Attorney's Manual requires prosecutors to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," with the significant caveat that "the attorney for the government consider, *inter alia*, such factors as the Sentencing Guideline range yielded by the charge, [and] whether the penalty yielded ... is proportional to the seriousness of the

defendant's conduct ...." U.S. Attorney's Manual, PRINCIPLES OF FEDERAL PROSECUTION § 9-27.300 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (hereinafter "U.S. Attorney's Manual"). The American Bar Association ("ABA") similarly has observed that

> [d]ifferences in the circumstances under which a crime took place, the motives behind or pressures upon the defendant, mitigating factors in the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.9(b) cmt. (3d ed. 1993) (hereinafter "ABA STANDARDS").

Many state statutory schemes expressly contemplate the use of prosecutorial discretion related to charging decisions. For example, under Colorado law, prosecutors are provided broad discretion either to pursue appropriate dispositions through plea agreements, including to "seek or not to oppose the dismissal of an offense charged if the defendant enters a plea of guilty or *nolo contendere* ... to another offense reasonably related to the defendant's conduct," COLO. REV. STAT. § 16-7-

301(2)(b), or to "consent to deferred prosecution," *id.* § 16-7-301(2)(d). *See also* WASH. REV. CODE § 9A.20.030(1) (directing prosecutors to investigate and recommend to the court when "the alternative of restitution ... is appropriate and feasible").

Such exercise of prosecutorial discretion *ex ante* complements the courts' authority to adjust sentences as appropriate and is an essential element of the dialogue between courts and prosecutors as to what constitutes appropriate punishment. The U.S. Sentencing Commission has recognized the sometimes imprecise alignment between the statutory definition of an offense and the actual conduct of an offender, and thus has provided mechanisms throughout the Sentencing Guidelines that allow sentencing courts to calibrate sentences to each individual. *See, e.g.*, U.S.S.G. § 4A1.3(b) (authorizing downward departures where "information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history"); *id.* § 5K2.0(a)(3) (departure from guideline range warranted if circumstances present are "substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense"). Now that the Federal Sentencing Guidelines are no longer mandatory, *United States v. Booker*, 543 U.S. 220, 245 (2005), federal courts have even greater discretion to individualize sentences such that they reflect, *inter alia*, "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1).

The exercise of a prosecutor's discretion, including to charge a lesser offense (or to decline to charge at all), is particularly important in recidivism cases, as these laws tend to have graver sentencing implications than anyone—including legislatures—expects, should prosecutors attempt to enforce them in all cases covered by their terms. KADISH, *supra*, at 1006. For example, depending on the circumstances of the case, a recidivist determination can increase the statutory maximum sentence for simple possession from one year up to as many as five years. *See* 21 U.S.C. § 844. Indeed, the U.S. Attorney's Manual specifically provides that the decision to seek a recidivism enhancement pursuant to section 851 should be treated with the same diligence and attention to the particular facts of a case as the pursuit of any other charge under the U.S. Code. *See* U.S. Attorney's Manual § 9-27.300 cmt. ("Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 ... as equivalent to the filing of charges."). Moreover, without a federal prosecutor's express decision to do so, a U.S. District Judge is without power to adjudicate a defendant as a felon under this statutory scheme. A prosecutor's decision not to seek a recidivist charge should be no more ignored by an immigration court than any other decision made by a prosecutor to charge one particular offense or another.[3]

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[3] For a discussion of the disparities in immigration courts' treatment of state and federal convictions, *see infra* Part II.

As another example, the implications of California's recidivist sentencing scheme are so grave that the statute affirmatively provides prosecutors with broad discretion in determining which prior convictions will trigger increased sentences under the law. Under California's "three strikes" law, if a defendant has one prior "serious" or "violent" felony conviction, he must be sentenced to "twice the term otherwise provided as punishment for the current felony conviction." CAL. PENAL CODE § 667(e)(1). Two or more such priors require a sentence of an indeterminate term of life imprisonment, with a minimum term of at least twenty-five years before eligibility for parole. *Id.* § 667(e)(2)(A). This third felony need not be "serious" or "violent"—"any felony can constitute the third strike ...." *Lockyer v. Andrade*, 538 U.S. 63, 67 (2003). However, the "three strikes" statutory scheme expressly provides for the exercise of prosecutorial discretion as a check against harsh results: "[t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice ... or if there is insufficient evidence to prove the prior conviction." CAL. PENAL CODE § 667(f)(2). Further, for certain offenses "known as 'wobblers,'" prosecutors may "exercise their discretion to charge a 'wobbler' as either a felony or a misdemeanor." *Ewing v. California*, 538 U.S. 11, 16-17 (2003).

In practice, the exercise of prosecutorial discretion has been the primary means of mitigating the impact of this sentencing regime. According to the California District Attorneys Association, "[d]ata from California's most populous counties reveal that

prosecutorial discretion to request the court to dismiss felony strikes is used in 21-40% of all Three Strikes cases." CAL. DIST. ATTORNEYS ASS'N, PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S THREE STRIKES LAW: A 10-YEAR RETROSPECTIVE 11 (2004), *available at* http://www.threestrikes.org/cdaa/Three Strikes_0.pdf; *see also id.* at i ("As District Attorney for San Mateo County since 1983, I ... signed the ballot argument in opposition to the Three Strikes initiative. In reality, the actual implementation of the law has been appropriate.... The fact that both the court and the prosecutor can cause priors to be stricken establishes a balance in the law that was missing when Three Strikes was first enacted.").

Lawmakers rely upon such discretion by prosecutors when enacting harsh laws, guided by the knowledge that, because most cases end in guilty pleas, prosecutors in reality use such laws as bargaining tools and exercise their discretion not to charge defendants to the fullest extent possible. *See* William J. Stuntz, Bordenkircher v. Hayes: *Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351, 377-78 (Carol S. Steiker ed., 2006) (making this argument with respect to Congress and state legislatures).

The government's suggestion that the mechanics of section 851 are merely "procedural" ignores the critical role that prosecutorial discretion plays in all charging determinations. (Br. in Opp'n 12.) Indeed, it is a fundamental principle that conduct that "is punishable" under the law is not equivalent to a criminal conviction. Following the government's theory to its logical conclusion would

grant immigration judges the authority to deem any number of misdemeanor possession convictions—including federal dispositions—as felonies, simply because the underlying conduct *could have been* punished as such, thus undermining the discretion of both state and federal prosecutors.

Second, when a court interferes with prosecutors' discretion in the direction of mercy while deferring to their discretion in favor of harshness, as the Fifth Circuit's decision would allow, it creates uncertainty about the consequences of convictions and thus undermines prosecutors' ability to secure dispositions via plea agreement. This Court has observed that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Because the vast majority of cases are resolved by pleas—97% of convictions in the nation's 75 most populous counties[4]—this reduction in defendants' willingness to plea bargain will hinder prosecutors' ability to manage and efficiently dispose of their cases, further exacerbating the "[e]xtreme docket pressure [that] characterizes DAs' offices, particularly in the large cities where crime rates tend to be highest." Daniel C. Richman & William J.

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[4] Tracey Kyckelhahn & Thomas H. Cohen, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2004*, BUREAU JUST. STAT. BULL. (U.S. Dep't of Justice, Office of Justice Programs, Wash. D.C.), Apr. 2008, at 3, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf.

Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601 (2005); *see also* U.S. Attorney's Manual § 9-27.420 cmt. 11 ("A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined.").

Uncertainty about the immigration consequences of convictions has had a significant impact upon the criminal justice system. It is already the case that "federal consequences of state crimes will vary according to state severity classifications when Congress describes an aggravated felony in generic terms, without express reference to the definition of a crime in a federal statute," *Lopez v. Gonzales*, 549 U.S. 47, 58 (2006), thus creating uncertainty as to how a conviction under a particular state's law will be treated for purposes of immigration law. Allowing the Fifth Circuit's decision to stand will affect prosecutors' ability to secure agreements by significantly increasing the possibility that even a plea to a minor offense will have untold immigration consequences. *See, e.g.*, Brittany Schoepp, *Panel Hears Deportation Fears of Hispanics*, WIS. STATE J., Feb. 26, 2008, at D1 (defense attorney stating that "many of his clients, who would normally accept plea bargains for minor crimes, are now too afraid that even a short jail sentence will mean deportation, so they take their case to trial").

Finally, the uncertainty created by the Fifth Circuit's decision in undermining prosecutorial discretion also adversely affects prosecutors' ability

to bring a lesser charge to secure cooperation agreements. As the ABA has noted, "[p]rosecutors frequently and properly choose to pursue a lenient course with one participant in a criminal activity in order to bring other, more serious, offenders to justice." ABA STANDARDS § 3-3.9(b) cmt. In cases that rely heavily upon evidence provided by confidential informants, a prosecutor's ability to induce a plea to a lesser charge avoids a public trial in which the informant's identity would be revealed, thus reducing the "likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed." U.S. Attorney's Manual § 9-27.420 cmt. 7. Obtaining cooperation through a plea in one case also can free up prosecutorial resources that may be better used to dispose of other cases.

In sum, the exercise of discretion in making charging decisions reflects an assessment of the facts, circumstances, and available resources by the prosecutor, the actor in the criminal justice system with the highest competence to exercise that discretion in a full and considered manner. Reversing the Fifth Circuit's decision would ensure that the crucial role that such discretion plays in the fair and efficient administration of criminal justice is respected by the lower courts.

B. The Fifth Circuit Failed to Account for the Important Role of Prosecutorial Discretion in the Statutory Scheme.

Given the necessary role that prosecutorial discretion plays in bringing a recidivist felony charge

under 21 U.S.C. §§ 844 & 851, the failure of the Fifth Circuit to meaningfully acknowledge such a role in its analysis is a fatal flaw.

Congress specifically enacted 21 U.S.C. § 851 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970), in order to give prosecutors discretion not to seek recidivist treatment. "Whereas the prior version of the statute made enhancements for prior offenses mandatory, the new statutory scheme gave prosecutors discretion whether to seek enhancements based on prior convictions." *United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002); *see also* Report of House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., *as reprinted in* 1970 U.S.C.C.A.N. 4566, 4576 ("[S]evere penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain.... [M]aking the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties....").

Nevertheless, in the decision below, the Fifth Circuit did not consider the import of the statutory scheme set forth in section 851, nor did it even mention the requirements a prosecutor must satisfy to charge a recidivist felony under section 844. *See Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009). The Court of Appeals simply deemed "correct" the immigration judge's holding that "[b]ecause Carachuri's second state conviction could

have been punished as a felony under the CSA, had he been prosecuted in federal court, he committed a 'drug trafficking crime,' making him ineligible for cancellation of removal." *Id.* at 264-65. Missing from this analysis is the critical fact that such conviction could be punished as a felony *only if* a prosecutor had chosen to prosecute it as such pursuant to the requirements of section 851.

Similarly, while the Seventh Circuit noted that compliance with section 851's requirements was mandatory to charge a recidivist felony under section 844, *Fernandez v. Mukasey*, 544 F.3d 862, 866 (7th Cir. 2008), it nevertheless also ignored the import of that provision in its analysis. Absent from its discussion was the fact that petitioners would have been considered recidivists under federal law *only if* they had been charged as repeat offenders under 21 U.S.C. § 851. *Id.* at 877 (Rovner, J., dissenting); *see also id.* ("And that is a big 'if.' After all, they were not charged as repeat offenders in state court. This is the 'one too many levels of hypothetical' with which we were concerned in [a previous case].").

It is telling that, unlike these courts, the executive agency charged with the execution of this nation's immigration laws and the agency with the greatest expertise in the enforcement of such laws gave due weight to the legislative scheme. In Petitioner's proceedings before the BIA, the Department of Homeland Security ("DHS") changed its position with respect to this issue, "conced[ing] that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to 'recidivist possession' unless the

State actually used those laws to prosecute [Petitioner]." *In re Carachuri-Rosendo*, 24 I. & N. Dec. at 390-91. The BIA observed that

> it seems that the DHS is troubled by the fact that a purely hypothetical approach, carried to its logical conclusion, could result in a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement.

Id. at 391 (emphases in original). It further noted that "it would ... be anomalous to treat a second State conviction for simple possession as the hypothetical equivalent of a Federal 'recidivist possession' conviction when the State affirmatively elected not to proceed under its own available recidivism laws." *Id.*

The Second Circuit embraced the BIA's reasoning in its decision addressing the treatment of multiple state possession offenses, and specifically noted how the alternate approach advanced by the Fifth and Seventh Circuits would encroach upon the administration of the criminal justice system. Deeming state possession convictions federal felonies, "even when the State explicitly elected not to pursue a recidivist conviction," "would intrude on prosecutorial discretion to make charging decisions, specifically undermining the State's ability to negotiate plea agreements with defendants who would admit guilt to drug possession with the

understanding that their criminal records would reflect misdemeanor and not felony convictions." *Alsol v. Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008).

In light of the clear policy imperatives of both the Congress that enacted section 851 and the federal agency charged with executing its mandate, this Court should reverse the decision of the Fifth Circuit in favor of the approach set forth by the BIA and the First, Second, Third and Sixth Circuits.

II. This Court Should Reverse the Fifth Circuit's Decision Because It Fundamentally Undermines State Interests in the Proper and Equitable Administration of Criminal Justice and Results in Disparate Treatment of Criminal Defendants Facing Convictions in State Versus Federal Courts.

The decision of the Fifth Circuit interferes with the administration of state criminal justice systems and upsets the appropriate balance between state and federal interests in our constitutional system of dual sovereigns. This Court has counseled federal courts to defer to appropriate exercises of state power as a matter of "proper respect for state functions, [as] a recognition of the fact that the entire country is made up of a Union of separate state governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Such deference is motivated by the "belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* The resulting balance between state and federal interests "is a system ... in which the National

Government, anxious though it may be to vindicate ... federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* Such deference is particularly important with respect to states' exercise of their competence in the field of criminal justice, since "[s]tates possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

The Department of Justice has a strong policy of deferring to state determinations regarding the seriousness and method of prosecuting crimes. The Department "refus[es] to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement." *Rinaldi v. United States*, 434 U.S. 22, 28 (1977); *see also* U.S. Attorney's Manual § 9-2.031 ("preclud[ing] the initiation or continuation of a federal prosecution, following a prior state ... prosecution based on substantially the same act(s) or transaction(s)," unless various substantive and procedural prerequisites are met).[5] The U.S. Attorney's Manual accordingly prohibits federal prosecution following a state trial unless there remain "substantial federal interest[s]" "demonstrably unvindicated" by the state proceedings. *See* U.S. Attorney's Manual § 9-2.031. That requirement cannot be met here.

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[5] This federal policy is called the "Petite policy," based on *Petite v. United States*, 361 U.S. 529 (1960).

Rather, Petitioner's circumstance presents a stark example of the severe consequences of inadequate respect for and deference to state determinations. Carachuri-Rosendo was a lawful permanent resident who has since been removed from the country and separated from his fiancée and four children, all of whom are U.S. citizens, based on a misdemeanor conviction for possession of a single tablet of Xanax, an anti-anxiety drug, without a prescription. This simple possession conviction was deemed a recidivist felony by the immigration court because of a prior misdemeanor conviction for possession of zero to two ounces of marijuana, despite the state prosecutor's decision not to charge Petitioner as a recidivist.[6]

When a federal court countermands a state prosecutor's considered decision in this fashion, it causes disparate treatment among state and federal defendants based solely on which government brought the prosecution. Had a federal prosecutor made the same charging decision with respect to Petitioner's second offense, her decision and Petitioner's immigration status presumably would have remained undisturbed.[7] Without addressing

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[6] While Petitioner's prior possession offense could not be used as the basis for a recidivist charge under Texas law, *see* TEX. PENAL CODE § 12.43, he also had a prior conviction for misdemeanor assault that could have served as the basis for a recidivist charge. The prosecutor nevertheless declined to seek a recidivism enhancement on that basis. (*See* Pet. Br. at 5.)

[7] The Fifth Circuit's decision does not address the circumstance where the underlying prosecution is federal, but applying its rationale to that context only emphasizes

the point, the Fifth Circuit nonetheless held that despite the considered decision of the state prosecutor not to pursue a felony charge, a federal immigration court may second-guess that exercise of discretion and penalize Petitioner as if he had been charged and convicted as a recidivist.

Given that nearly all criminal prosecutions proceed in state rather than federal court, the Court of Appeals' approach risks a pervasive problem. As noted above, the U.S. Attorney's Manual contemplates treating the decision to file an information under section 851 for a recidivist enhancement as equivalent to the decision to file a charge and notes that there are legitimate policy reasons why a prosecutor might decline to charge a defendant as a recidivist. U.S. Attorney's Manual § 9-27.300 cmt. "Such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office." *Id.* Clearly, prosecutors may also exercise their discretion to forgo a recidivist enhancement, as particularly relevant here, because a review of the individual facts and circumstances—including the seriousness of both past and present conduct—may reveal that such an enhancement is not warranted. *Cf. id* § 9-27.230

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its incoherence: an individual convicted of a federal misdemeanor would be deemed convicted of a federal felony even though he was neither prosecuted for, nor convicted of, a federal felony in the underlying proceeding. (*See* Pet. Br. at 22.)

cmt. (listing factors to be considered in determining whether prosecution should be declined, including, *inter alia*, "the nature and seriousness of the offense involved," "the degree of the person's culpability in connection with the offenses," "the nature of the person's prior criminal involvement," and "the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution").

In practice, federal prosecutors readily exercise their discretion to decline a recidivist charge. According to figures compiled by the Bureau of Justice Statistics, 1,376 defendants were charged under 21 U.S.C. § 844 in 2007. In that same year, only three reported felony convictions included a record of an information filed pursuant to 21 U.S.C. § 851.[8] *See* Bureau of Justice Statistics, Federal Justice Statistics Resource Center, http://fjsrc.urban.org/. By contrast, based on the most recent data available, over 160,000 defendants were convicted of drug possession felonies in state courts in 2004. *See* Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004*, http://bjs.ojp.usdoj.gov/content/pub/html/scscf04/tabl

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[8] While some of these 1,376 defendants may not have been eligible for a recidivist charge because they were already charged as felons under a different provision of section 844 based on the substance they possessed, the fact remains that there were nevertheless very few instances in which a section 851 information was filed.

es/scs04101tab.cfm.[9] Thus, while a miniscule portion of federal defendants in drug cases have actually been convicted of recidivist felonies, many thousands of state defendants convicted of drug possession misdemeanors could be treated as recidivist felons under federal law under the Fifth Circuit's approach. If federal prosecutors deciding whether to charge a defendant as a recidivist may properly consider whether they are overburdened, whether resources merit prosecution, or whether the circumstances of the case warrant an enhancement, certainly state prosecutors—with their far more crushing caseloads—are entitled to take those same factors into account and to receive the same deference as to their judgment.

III. This Court Should Reverse the Fifth Circuit's Decision Because the Scheme Set Forth Can Lead to a Violation of a Defendant's Right to Trial by Jury Under the Sixth Amendment.

Should the Fifth Circuit's decision stand, defendants convicted of a misdemeanor offense to which a jury trial right does not attach could nevertheless have that conviction treated as an aggravated felony—an offense to which the right *does* attach. To treat a defendant as a convicted felon while depriving her of a trial by jury for that offense violates her rights under the Sixth Amendment.

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[9] Only data on felony (not misdemeanor) offenses are available on the Bureau of Justice Statistics website.

Under the Sixth Amendment, "a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 542 (1989); *see also* U.S. CONST. amend. VI. There is, however, "a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision ...." *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). While this Court has declined to categorically classify offenses carrying a maximum term of six months or less as "petty" offenses, it has held that it is "appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'" *Blanton*, 489 U.S. at 543. In light of this presumption, "[a] defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.*

Some jurisdictions have limited the jury trial right to extend only to charges for offenses with an authorized term of greater than six months. *See, e.g.*, N.Y. CRIM. PROC. LAW § 340.40(2). Other jurisdictions have authorized maximum penalties for several drug possession offenses of less than six months. *See, e.g.*, COLO. REV. STAT. § 18-18-406(3) (possession and open display or consumption of not more than one ounce of marijuana is punishable at maximum by a fine and fifteen days in county jail). Thus, in jurisdictions with limitations upon the jury trial right, there are drug possession offenses to

which that right does not attach, but which, for a defendant convicted multiple times, could under the Court of Appeals' approach be treated as aggravated felonies. For example, under New York law, criminal possession of marijuana in the fifth degree is a Class B misdemeanor, N.Y. PENAL LAW § 221.10, punishable by a term of imprisonment that "shall not exceed three months," N.Y. PENAL LAW § 70.15(2). A defendant in New York City charged with a misdemeanor with an authorized term of less than six months is eligible only for a bench trial. *See* N.Y. CRIM. PROC. LAW § 340.40(2). Thus, a defendant twice convicted in New York City of possession of marijuana in violation of section 221.10 who is facing removal proceedings in the Fifth Circuit could be treated as a felon, despite being unable to secure a trial by jury for the second offense in violation of her Sixth Amendment right to trial by jury.

This Court should reverse the decision below to ensure that defendants facing removal proceedings are not deprived of their right to a trial by jury in violation of the Sixth Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fifth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 5-2 on the following question presented by this case: Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

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INTERESTS OF *AMICI CURIAE*[1]

Lawful resident immigrants are deportable based on virtually any drug-related conviction. However, the Attorney General retains discretion to cancel removal in certain cases unless the immigrant is convicted of an "aggravated felony." In aggravated felony cases, Immigration Judges representing the Attorney General cannot consider cancelling removal. Nor are asylum or several other forms of relief available even if removal may be harmful for the noncitizen or her family. No exception exists, even for members or veterans of the U.S. Armed Forces, noncitizens with spouses and children who are citizens of the United States, non-citizens who have been gainfully employed, non-citizens who spent most of their lives in the United States, or asylum seekers who have experienced persecution in their home countries.

Amici, criminal defense and immigrant service organizations with criminal/immigration law and practice expertise, therefore know firsthand and are concerned that the holding of the court below—that two disparate, unconnected, low-level convictions for simple drug possession can be combined for the first time in federal immigration proceedings to become a conviction for "illicit trafficking in a controlled substance," and therefore an "aggravated felony"—imposes severe and unwarranted harm on long-term

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[1] Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

permanent residents and other non-citizens who pled guilty in summary proceedings to such low-level simple possession offenses.

The lower court's holding has been applied even where the state-law disposition is not a criminal "conviction" at all, but is a lower-level civil offense. In fact, many low-level simple possession cases have long been disposed of in state and county courts through quick and summary proceedings, yielding dispositions that bear no resemblance to federal recidivist felony convictions.

As organizations concerned with the proper and consistent interpretation of intersecting immigration and criminal law, *amici* believe the lower court's position is inconsistent with Congressional intent and common sense, and also works an unwarranted and confusing departure from the prior precedents of this Court, the considered judgment of the government's own Board of Immigration Appeals, and all but one of the other circuit courts that have addressed this question. *Amici* respectfully urge the Court to resolve the important issues raised in this matter consistent with the view of the majority of circuit courts and of the Board of Immigration Appeals.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in all 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, advance and disseminate knowledge in the area of criminal practice, and encourage integrity, independence, and

expertise among criminal defense counsel. NACDL is focused on advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **National Legal Aid and Defender Association** (NLADA), a non-profit corporation, works to support indigent defender services and provide civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council dedicated to promoting fair justice systems and ensuring citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including non-profit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members. NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national non-profit membership association that devotes its resources exclusively to serving the equal justice community. NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed *amicus curiae* briefs in major constitutional cases before this Court and other federal and state courts involving the administration of the criminal justice system and the right to counsel.

The **Immigrant Defense Project** (IDP) provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on *amicus curiae* briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including this Court's recent decision in *Lopez v. Gonzalez*, 549 U.S. 47 (2006). *See* Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., *Lopez v. Gonzales*, 549 U.S. 47 (2006), available at http://www.immigrantdefenseproject.org/webPages/drugLitigationInit.htm; *see also* Brief for *Amici Curiae* NACDL, New York State Defenders Association Immigrant Defense Project, et al., *Leocal v. Ashcroft*, 543 U.S. 1 (2004); Brief for *Amici Curiae* NACDL, New York State Defenders Association Immigrant Defense Project, et al., *INS v. St. Cyr*, 533 U.S. 289 (2001) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to indigent immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

The **National Immigration Project of the National Lawyers Guild** (National Immigration Pro-

ject) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of IMMIGRATION LAW AND CRIMES and three other treatises published by Thomson-West. The National Immigration Project has participated as *amicus curiae* in several significant immigration-related cases before this Court.

SUMMARY OF ARGUMENT

This Court held in *Lopez* that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." 549 U.S. at 60. The Fifth Circuit nonetheless treated petitioner's state conviction as a felony punishable under the Controlled Substances Act even though the state offense of conviction—possession of Xanax without a prescription—is punishable only as a misdemeanor under federal law. In doing so, the Fifth Circuit became only the second court of appeals to take a position that has been soundly rejected by five of its sister courts (the First, Second, Third, Sixth, and Tenth Circuits) and by the government's own Board of Immigration Appeals (BIA).[2]

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[2] *Compare Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009); *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *with Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006); *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); *Rashid v. Mukasey*, 531 F.3d 438

The Fifth Circuit's interpretation makes a federal drug "trafficking" crime out of thousands of low-level simple possession dispositions, which are routinely handled in state and county courts through summary proceedings. In many jurisdictions, such violations result in no more than a small fine and often leave the defendant with no state "criminal record." The relatively minor penal law consequences of these proceedings are matched by their minimal procedural safeguards and perfunctory nature. Having had little opportunity or motivation to resist or contest the validity of such low-level charges, non-citizens detained and placed in removal proceedings in the Fifth Circuit now find themselves facing the U.S. immigration law's most severe and unyielding penalties.

To make matters worse, immigration proceedings offer no mechanism for these immigrants to challenge or even examine the validity of those low-level possession dispositions. Thus, non-citizens in the Fifth Circuit face mandatory detention and removal, with no opportunity to seek discretionary relief, even though they never had a genuine opportunity to examine—either in criminal or immigration proceedings—the existence or validity of any past simple possession convictions. This stands in stark contrast to the requirements enacted by Congress and the States for prosecuting and convicting individuals of recidivist drug possession offenses.

(6th Cir. 2008); *United States v. Santana-Illan*, No. 08-4210, 2009 WL 5103592 (10th Cir. Dec. 29, 2009); *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (BIA 2007) (en banc).

Beyond the direct impact of the Fifth Circuit's interpretation on individuals, it would also impede the efficient administration of justice. Imposing the drastic penalties of an "aggravated felony" determination on state simple possession dispositions, as required by the Fifth Circuit, would discourage defense counsel from recommending plea agreements for noncitizens charged with a second or subsequent possession offense. With the option of plea bargaining thus eliminated in many cases, the courts before which our member-practitioners practice will become increasingly unable to handle the massive and growing number of low-level drug possession prosecutions. Moreover, the Fifth Circuit's interpretation would frustrate the efforts by many States to relieve bloated criminal dockets and ease the overcrowding of jails and prisons through innovations such as drug courts, which rely on plea agreements to avoid trials and offer drug treatment as an alternative to incarceration.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION SWEEPS WITHIN THE "AGGRAVATED FELONY" "TRAFFICKING" TERM LARGE NUMBERS OF LOW-LEVEL SIMPLE POSSESSION OFFENSES BEARING NO RESEMBLANCE IN PRACTICE TO THE RECIDIVIST OFFENSES DESIGNATED BY CONGRESS.

The Fifth Circuit's decision treats virtually all second or subsequent state simple possession convictions as if they "could have been punished as a felony under federal law" even if such federal prosecutions would have depended on proof of facts beyond those

required by the state statute of conviction.[3] The Fifth Circuit's approach would combine even a non-criminal charge for de minimis marijuana possession in 2000 and an unrelated non-criminal charge for de minimis marijuana possession in 2007 to form a mythical drug "trafficking" conviction for the non-citizen.[4] The Fifth Circuit thus conflates unrelated and disparate acts of simple drug possession into the federal felony of recidivist possession.

In defending this view, the government has likewise analogized low-level state drug possession offenses to the federal felony of recidivist possession, even when such low-level state simple possession offenses bear no similarity, in law or in practice, to the federal felony of recidivist possession under 21 U.S.C. § 844(a). The federal recidivist statute, 21 U.S.C. § 851, requires prosecutors to make an affirmative decision to charge the fact of the alleged prior conviction and further guarantees the defendant the right to challenge the fact and validity of that earlier conviction. Federal prosecutors invoke Section 851 sparingly, and almost never against defendants who plead guilty. By contrast, simple drug possession prosecutions are processed in massive numbers, at great speed, with minimal procedural protections, and frequently without counsel—all without litigation over the validity of any prior conviction. There is no reason to believe that Congress contemplated, much less intended, in its drafting of

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[3] *Carachuri-Rosendo*, 570 F.3d at 266-67.

[4] *See In re Jerry Lemaine*, A74 239 713 (BIA March 4, 2008), *appeal docketed*, No. 08-60286 (5th Cir. August 7, 2008).

the aggravated felony provision, that the two would be treated the same.

A. To Obtain A Conviction For Felony Recidivist Drug Possession, A Federal Prosecutor Must Charge, Prove, And Defend As Valid, The Defendant's Prior Drug Possession Conviction, Which Federal Prosecutors Rarely Do.

In both law and practice, a federal felony recidivist possession conviction represents a federal prosecutor's determination to charge, and a court's finding as part of its judgment, that the individual engaged in a more serious offense than simple drug possession. In fact, in custom and practice, federal felony recidivism prosecutions are infrequently brought, in large part because prosecutors generally do not prosecute defendants as recidivists if defendants plead guilty.[5] The United States Sentencing Commission gathered data in 1995 and again in 2000 and found that, respectively, only 6.5 percent and 6.9 percent of offenders with prior *felony* drug convictions were adjudicated as recidivists.[6] As a result,

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[5] Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements In A World of Guilty Pleas*, 110 YALE L.J. 1097, 1153 (2001).

[6] THE UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 89 (November 2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf.

the Commission correctly observed that the recidivist offense "is more often avoided than sought."[7]

Indeed, official Department of Justice policy explicitly permits prosecutors to forgo recidivist charges "after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity."[8] This reflects Congress's mandate that an exercise of prosecutorial discretion in favor of charging a defendant as a recidivist *must* precede any punishment of the offender as a recidivist[9]—a requirement of particular importance for non-citizen defendants given that the consequences of that label are so severe for them. In fact, both the BIA and the Department of Homeland Security (DHS), at an earlier stage in this litigation, recognized the critical importance of the prosecutor's decision not to seek a recidivist conviction.[10]

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[7] *Id.*

[8] John Ashcroft, *Memo Regarding Policy On Charging Of Criminal Defendants Charging Memo* (September 22, 2003), *available at* http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

[9] *See United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002) (noting that the key purpose of § 851 was to grant prosecutors "discretion [over] whether to seek enhancements on prior convictions").

[10] *See Carachuri-Rosendo*, 24 I. & N. Dec. at 392 ("Federal recidivist felony treatment hinges not simply on potential punishment; it requires the actual invocation by a Federal prosecutor of the recidivist enhancement features of Federal law. Indeed, the DHS acknowledges that a State possession offense cannot correspond to a Federal recidivist felony unless the State prosecutor actually invoked the available recidivist enhancement provisions of State law.").

The government's position here, on the other hand, would require an immigration court to find that a non-citizen had been "convicted" of a "recidivist felony" offense even though the prosecutor decided *not* to charge a recidivist offense. In fact, even a defendant's conviction in district court for a *federal misdemeanor*, based on the federal prosecutor's decision not to seek a "recidivist" judgment, would turn into a conviction for the aggravated felony of recidivist drug possession if later immigration proceedings are commenced. This cannot be. Congress could not have intended, without clearly saying so, that a federal misdemeanor conviction is really a federal felony conviction, and an aggravated felony at that.

Moreover, the federal recidivist statute, 21 U.S.C. §§ 844(a) and 851, guarantees defendants who are charged under it an array of important protections, beginning with the requirement that the prosecutor allege the fact of the prior conviction in a pretrial information that guarantees the defendant the opportunity to confront the allegation.[11] Thus, in Section 851, Congress (i) demanded that a prosecutor affirmatively advance a recidivism charge, and (ii) provided the accused the right to challenge a prior conviction before the defendant can be convicted as a recidivist.[12] As the BIA observed: "[T]hese minimal requirements governing findings of recidivism are part and parcel of what it means for a crime to be a

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[11] *See* 21 U.S.C. §§ 844(a), 851.

[12] *See Custis v. United States*, 511 U.S. 485, 491-92 (1994).

'recidivist' offense."[13] Without complying with Sections 844(a) and 851, a federal prosecutor can only charge a defendant with a simple possession misdemeanor—and thus there can be no conviction of a recidivist felony.[14]

B. The Vast Majority Of States Also Have Recidivist Possession Statutes That Require A Finding Of Recidivism.

Federal law is not unique in providing for enhanced punishment in those possession cases where a state has determined that a prior possession conviction is serious enough to warrant recidivist treatment. At least 45 states have statutes providing separate offenses for simple possession and recidivist possession[15]—among these are state recidivist pos-

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[13] *Carachuri-Rosendo*, 24 I. & N. Dec. at 391.

[14] *See United States v. LaBonte*, 520 U.S. 751, 759-60 (1997).

[15] *See* Ala. Code § 13A-12-213(a)(2); Alaska Stat. § 12.55.155(c)(15); Ariz. Rev. Stat. § 13-901.01; Ark. Code Ann. § 5-64-401(c)(2)-(3); Cal. Penal Code § 1210.1(b)(5); Colo. Rev. Stat. § 18-1.3-801; Conn. Gen. Stat. § 21a-279(a) and (b); 11 Del. C. § 4214; D.C. Code § 48-904.08(a); Ga. Code Ann. § 16-13-30(a), (c), (e), (g), (l); Haw. Rev. Stat. § 706-606.5(1)(a)-(c); Idaho Code § 37-2739(a); 720 Ill. Comp. Stat. 550/4; Ind. Code Ann. § 35-48-4-11(c); Iowa Code § 124.401(5); Kan. Stat. Ann. § 65-4162; Ky. Stat. Ann. §§ 218A.1415-17; Lou. Rev. Stat. § 40:966(E); Md. Code Crim. Law §§ 5-905; 5-601(c)(2); Mass Gen. Laws ch. 94C, § 34; Mich. Comp. L. 333.7413(2); Minn. Stat. 152.021-025(3); Miss. Code § 41-29-147; Mo. Rev. Stat. § 195.285; Mont. Code. § 46-18-501; Neb. Rev. Stat. § 29-2221; Nev. Rev. Stat. 193.130; N.H. Rev. Stat. § 651:6; N.M. Stat. 31-18-17; N.Y. Penal Law 70.70(3); N.C. Gen. Stat. § 90-95(e)(3)-(4); N.D. Cent. Code § 12.1-32-09; Ohio Rev. Code. Ann. 2925.11(C)(2)(A); Okla. Stat. tit. 63, § 2-402(B); 35 Pa. Cons.

session statutes incorporating requirements that the prosecutor affirmatively charge the prior offense and that the defendant have the opportunity to challenge it. For example, Texas Penal Code § 12.43 provides misdemeanor recidivist convictions if, and only if, the prosecutor has "shown on the trial . . . that the defendant has been before convicted" of any felony or certain misdemeanors. Texas law guarantees that "[a] prior conviction that was alleged for enhancement may be collaterally attacked if it is void (as it would be if it were based on a fundamentally defective indictment) or if it is tainted by a constitutional defect (as it would be if an indigent defendant had been denied counsel in a felony trial)."[16]

Other States draw similar distinctions between recidivist and non-recidivist offenses. For example, anyone charged under the Massachusetts recidivist possessor statute "shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials."[17] Under Massachusetts law, a recidivist posses-

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Stat. Ann. § 780-113(b)(c); R.I. Gen. Laws 21-28.4.11(A); S.C. Code Ann. 44-53-370; S.D. Codified Laws 22-7-7; Tenn. Code Ann. 39-17-418; Tex. Penal Code § 12.42; Utah Code Ann. § 58-37-8(2)(c), 2(d); Vt. Stat. Ann. tit. 18, 4238; Va. Code Ann. § 18.2-250.1(A); Wash. Rev. Code 69.50.408, 425; Wis. Stat. 961.41(3g)(e); Wyo. Stat. Ann. § 35-7-1031(c)(i).

[16] *Galloway v. State*, 578 S.W.2d 142, 143 (Tex. Crim. App. 1979).

[17] *See* Mass. Gen. Laws ch. 278, § 11A ("If a defendant pleads guilty [to a subsequent offense] or if there is a verdict or finding of guilty after trial, then before sentence is imposed, the defendant shall be further inquired of for a plea of guilty or not guilty to that portion of the complaint or indictment alleging that the crime charged is a second or subsequent offense. If he

sion offense authorizes a term of imprisonment twice as long as a simple possession offense.[18]

C. The Common And Low-Level State Simple Possession Offenses Swept Up By The Fifth Circuit's Approach Bear No Resemblance, In Doctrine Or Practice, To Federal Felony Recidivist Possession.

Simple drug possession prosecutions stand in stark contrast to federal felony recidivism prosecutions in both law and practice. Although federal recidivist prosecutions require special due process protections and an explicit court finding, state simple drug possession pleas are obtained in massive numbers, with great speed, and with minimal process. By automatically equating a low-level state simple drug possession disposition—*i.e.*, one that was not prosecuted as a recidivist offense—with federal felony recidivism, the Fifth Circuit's decision imposes the immigration system's severest penalties on noncitizens who may have pleaded guilty in quick and summary proceedings designed for the most minor of offenses.

In contrast to the care exercised in those rare instances of felony recidivist prosecutions for drug possession, state simple drug possession charges are legion. In 2000 alone, more than 1.5 million persons were arrested for a drug offense, and more than four-

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pleads guilty thereto, sentence shall be imposed; if he pleads not guilty thereto, he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials.").

[18] *See* Mass. Gen. Laws ch. 94C, § 32D(a)-(b).

fifths of these arrests were for drug possession.[19] Moreover, the numbers have trended upward dramatically in recent years, particularly for low-level offenses—such as the possession of small amounts of marijuana. For example, in Illinois from 1995 to 2005, the arrest rate for marijuana violations increased 54 percent.[20] Nationally, between 1990 and 2002, marijuana possession arrests increased by 113 percent.[21] In some localities, including our largest metropolitan areas, this expansion was even more dramatic. In New York City for example, marijuana arrests increased by 882 percent over the same pe-

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[19] *See* Arthur J. Lurigio, Fed. Probation 13, 13 (June 27, 2008) ("Since the 1980s an overwhelming emphasis on law enforcement strategies to combat illegal drug possession and sales has resulted in dramatic increases in the nation's arrest and incarceration rates. Although general population surveys reported declines in illegal drug use during the 1990s, rates of arrest and incarceration for drug offenses rose at a record pace into the twenty-first century. Drug offenses have been among the largest categories of arrests for the past 20 years. From 1980 to 2000, arrests for drug offenses more than doubled." (internal citations omitted)).

[20] ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, TRENDS AND ISSUES 2008: A PROFILE OF CRIMINAL AND JUVENILE JUSTICE IN ILLINOIS: 1995-2005 (May 2008), *available at* http://www.icjia.state.il.us/public/pdf/TI%202008/T&I%202008%20Full%20Report.pdf.

[21] Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3 HARM REDUCTION J. 1, 3 (2006), *available at* http://www.harmreductionjournal.com/content/pdf/1477-7517-3-6.pdf.

riod.[22] The most common arrest was for possession of marijuana in the public view.[23]

The criminal penalties imposed for these large numbers of low-level state possession dispositions are relatively minor. Between 1995 and 2004, for example, New York State convicted 258,655 people for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor under New York law,[24] and almost 60 percent resulted in sentences of time served, probation, conditional discharge (a sentence imposed in lieu of incarceration), or a simple fine. Of the remainder, the median length of sentence imposed was approximately nineteen days.[25] Indeed, in several states, simple marijuana possession "absent aggravating circumstances . . . is a *non-criminal* violation."[26]

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[22] *Id.* at 8.

[23] *See* Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnic Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 132-33 (2007).

[24] N.Y. STATE DEFENDERS ASS'N, ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), *available at* http://www.immigrantdefenseproject.org/docs/05_Analysis.pdf. A person is guilty of Criminal Possession of a Controlled Substance in the Seventh Degree when he knowingly and unlawfully possesses a controlled substance. N.Y. PENAL LAW § 220.03.

[25] N.Y. STATE DEFENDERS ASS'N, *supra* note 24.

[26] *See People v. Finley*, 891 N.E.2d 1165, 1169 (N.Y. 2008) (emphasis added) (citing N.Y. Penal Law Section 221.05); *People v. White*, 56 N.Y.2d 110, 112 (N.Y. 1982) (explaining that § 221.05 is "defin[ed] . . . as 'unlawful' rather than 'criminal'"); *see also* Minn. Stat. § 152.027, subd. 4(a) (classifying possession

In contrast to the protections afforded by the federal and state recidivist possession statutes, low-level state drug charges are often processed quickly and with minimal procedural protections due to the understanding that serious consequences will not follow from a conviction. Defendants facing such charges often get arraigned, plead guilty or "no contest," and are sentenced on the same day.[27] Likewise, neither the defense nor the prosecution has the time or resources to investigate the merits of individual cases. Indigent defendants may speak to their defense attorney for the first time only minutes before arraignment, if at all.

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of "small amount of marijuana" as a "petty misdemeanor"); Minn. Stat. § 609.02, subd. 4a (stating that a "petty misdemeanor" "does not constitute a crime"); Mass. Gen. Laws ch. 94C, § 32L (classifying possession of one ounce or less of marijuana as a "civil offense"); Me. Rev. Stat. tit. 22 § 2383(1)(A) (classifying possession of up to 2 1/2 ounces of marijuana as a "civil violation"). Numerous other states punish simple possession of a small quantity of marijuana as an extremely low-grade offense carrying no possible jail sentence. *See, e.g.*, Cal. Health & Safety Code § 11357(b) (imposing up to $100 fine for possession of not more than 28.5 grams of marijuana); Colo. Rev. Stat. § 18-18-406(1) (imposing penalty of up to $100 fine for possession of not more than one ounce of marijuana); Miss. Code Ann. § 41-29-139 (imposing penalty of between $100 and $250 fine for possession of up to 30 grams of marijuana); Neb. Rev. Stat. Ann. § 28-416(13)(a) (imposing a $300 fine and requiring attendance at an educational class); Ohio Rev. Code Ann. § 2925.11(C)(3)(a) (classifying possession of less than 100 grams of marijuana as a "minor misdemeanor"); Ohio Rev. Code Ann. § 2901.02 (noting potential penalty for minor misdemeanor is a fine not exceeding $150).

[27] *See* N.Y. STATE BAR ASS'N, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17–18 (2001).

Many do not even have an attorney. A 2000 Bureau of Justice Statistics report revealed that 28.3 percent of surveyed state-jail inmates had no counsel in the misdemeanor prosecutions leading to their incarceration.[28] Uncounseled misdemeanor pleas are even more prevalent in Texas. An April 2009 report of *amicus* NACDL found that "[t]he vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas," with three-quarters of Texas counties appointing counsel in fewer than 20 percent of jailable misdemeanor cases.[29] In one Texas county, *amicus* NACDL's researchers observed court staff routinely directing uncounseled misdemeanor defendants to confer directly with the prosecutor regarding a possible plea; in some cases defendants pleaded to jail sentences without being informed of their right to counsel.[30]

At the same time, states have expanded drug possession statutes to sweep in even wider ranges of conduct, including possession absent traditional levels of scienter.[31] In addition, due to the immense number of simple possession arrests, many jurisdic-

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[28] CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES, NCJ 179023 at 6, Table 13 (Nov. 2000).

[29] ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 15 (2009) (internal quotation marks and citation omitted), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf.

[30] *Id.* at 16-17.

[31] MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USES AND ABUSES OF VICTIMS' RIGHTS 35-37 (2002) (describing state statutes that do not require proof that the individual knew he or she was "possessing anything at all").

tions have lowered procedural and evidentiary protections far below those afforded for other misdemeanors, let alone the protections required for felonies. Thus, those accused of drug possession have few available defenses. For example, many cannot take advantage of distinctions between principals and accomplices.[32] "Whereas the law of complicity has long been careful to remind itself that mere presence does not an accomplice make, the law of possession has had no difficulty imposing liability on that very basis."[33] As one illustration, in New York, "from evidence of your being in a car or a room with a controlled substance, the prosecutor without additional evidence, gets to jump to the conclusion that you possessed the drugs, and [that you] knew that you did."[34] As a result, a single drug item (including paraphernalia) found in a car will be treated as "possessed" by every person in the car, and all the occupants are subject to prosecution.[35] By contrast, in federal drug possession prosecutions, mere proximity to a narcotic or mere association, without more, is not proof of possession sufficient to raise the presumption of guilt.[36]

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[32] Dubber, *supra* note 31, at 38.

[33] *Id.* at 65; *see also id.* at 35 (describing how possessory offenses do not lend themselves to defenses of necessity or self-defense).

[34] *Id.* at 37.

[35] *See, e.g.*, N.Y. Penal Law § 220.25 ("The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found . . . .").

[36] *See U.S. v. Canada*, 459 F.2d 687, 688 (5th Cir. 1972); *Araujo-Lopez v. U.S.*, 405 F.2d 466, 467 (9th Cir. 1969); *Amaya*

In addition, many of the courts in which state simple drug possession charges are prosecuted bear little resemblance to those courts where federal felony recidivism prosecutions are brought. For example, in New York, drug misdemeanor or non-criminal violation cases may be heard before one of the State's 1,250 town or village courts in which three-quarters of the judges are non-lawyers who, until very recently, received only a single week of training.[37] Recent investigations have documented the "extensive failings in the courts—including town and village justices who . . . made racist remarks, released friends without bail, denied some defendants lawyers and jailed some of them without trials."[38] In 2008, a commission appointed by then Chief Judge of the New York Court of Appeals, Judith S. Kaye, noted that "many non-attorney justices face difficulties handling complex motions and misdemeanor jury trials."[39]

As noted earlier, the contrast with federal recidivist prosecutions is stark indeed.[40] The Fifth Circuit's decision to treat all second or subsequent simple pos-

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v. U.S., 373 F.2d 197, 199 (10th Cir. 1967); *Bass v. U.S.*, 326 F.2d 884, 886 (8th Cir. 1964).

[37] *See* William Glaberson, *Reform of New York's Courts Stalls*, N.Y. TIMES, Jan. 8, 2010 A18; *see also* TESTIMONY OF COREY STOUGHTON, STAFF ATTORNEY AT THE NEW YORK CIVIL LIBERTIES UNION BEFORE JUDICIARY COMMITTEE OF THE NEW YORK STATE ASSEMBLY REGARDING PROPOSALS TO REFORM THE NEW YORK STATE JUSTICE COURTS (Dec. 14, 2006), *available at* http://www.nyclu.org/node/748.

[38] *Id.*

[39] *Id.*

[40] Bibas, *supra* note 5, at 1153.

session convictions as recidivist convictions runs counter not only to the law but also to the realities of low-level drug prosecutions.

II. Low-Level Possession Dispositions Cannot Be Challenged Or Even Examined In Subsequent Immigration Proceedings.

By enacting 21 U.S.C. §§ 844(a) and 851, Congress ensured that no person would be convicted of federal felony recidivist possession without a fair opportunity to challenge the fact and validity of the alleged prior conviction. The court below erred in concluding that a non-citizen could be deemed "convicted" of a recidivist possession felony based on a simple possession charge that does not even mention any prior conviction. The consequences of this omission are magnified by the fact that immigration proceedings likewise offer no opportunity to examine the validity of alleged prior possession dispositions—a defect of serious concern given the circumstances described *supra* in Argument Point I—and, as a practical matter, place extreme burdens on a non-citizen's ability to challenge even the fact of a prior disposition. As a result, persons facing removal on account of a second simple possession non-recidivist conviction will have had no opportunity to challenge alleged prior possession convictions in *either* their criminal *or* immigration proceedings.

Removal proceedings offer immigrants no opportunity to challenge the validity of prior convictions.[41]

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[41] *See Mansoori v. INS*, 32 F.3d 1020, 1023-24 (7th Cir. 1994) (finding immigration judges lack statutory authority to review the validity of a prior conviction); *Matter of Rodriguez-*

If the evidence indicates that a removable offense occurred, "an immigration judge cannot go behind the judicial record."[42] This prohibition remains even where the non-citizen was not represented by counsel in the prior criminal proceeding—an all too common circumstance, as discussed above.[43] This stands in contrast to federal criminal proceedings, where the legal consequence of denial of counsel outright must be considered by a judge before deciding whether to punish the defendant as a recidivist.[44]

Non-citizens in immigration proceedings are limited even in being able to challenge the "fact" of the prior conviction. DHS has "the burden of establishing by clear and convincing evidence" the non-citizen's prior conviction alleged as the basis for removal;[45] however, Immigration Judges often find that DHS has met this burden by presenting minimal documentation, such as a "rap sheet." In practice, what

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Carrillo, 22 I. & N. Dec. 1031, 1034 (BIA 1999) ("[I]t is clear that an Immigration Judge and the Board [of Immigration Appeals] cannot entertain a collateral attack on a judgment of conviction, unless that judgment is void on its face, and cannot go behind the judicial record to determine the guilt or innocence of an alien.").

[42] *Matter of Khalik*, 17 I. & N. Dec. 518, 519 (BIA 1980).

[43] *Matter of Medina*, 15 I. & N. Dec. 611, 614 (BIA 1976) ("[C]ounsel claims that the respondent was not represented at the time of the 1971 Illinois conviction. We, however, may not go behind the record of conviction.").

[44] *See Custis v. United States*, 511 U.S. 485, 489 (1994) (recognizing "the right of a defendant who had been completely deprived of counsel to assert a collateral attack on his prior convictions").

[45] 8 U.S.C. § 1229a(c)(3)(A).

should be a straightforward process is often compromised by serious errors in the documentary record. According to a 2007 study: "Fully 62 percent of [a] random sample of official [New York] state rap sheets contained at least one significant error; 32 percent had multiple errors."[46]

Moreover, because non-citizens deemed deportable based on drug offenses are subject to mandatory detention, it is particularly difficult to mount any challenge to the validity or even the fact of a prior drug conviction. According to the Department of Justice, 84 percent of detained non-citizens in removal proceedings are unrepresented, compared to 58 percent of all non-citizens in removal proceedings.[47] Even non-citizens who obtained counsel at the outset commonly lose that legal assistance following a transfer.[48] During the first six months of 2008, the

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[46] J. McGregor Smyth, Jr., *From Arrest to Reintegration*, 24 Crim. Just. 42, 45 (Fall 2009).

[47] AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30 (2009) (citing Executive Office for Immigration Review, Department of Justice, *FY 2007 Statistical Yearbook* G1 (2008)), *available at* http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf.

[48] Peter Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 558 (2009) (noting the "significant disincentive for private and pro bono attorneys to take on detained clients in removal proceedings" due to high rate of detainee transfer and immigration courts' refusal to allow counsel to make telephonic appearances); HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY, 49-55 (Dec. 2009), *available at* http://www.hrw.org/sites/default/files/reports/us1209web.pdf. (discussing cases of detained respondents who lost counsel following transfer).

latest period for which complete data are available, the majority (52.4 percent) of detainees were transferred.[49] Motions to change venue, so that a client can be returned to the jurisdiction where he had previously obtained counsel, are frequently denied.[50]

Furthermore, detained individuals are often transferred to facilities far from the location of their removable offense. DHS "has adopted a freewheeling transfer policy," moving detainees "often over long distances and frequently to remote locations."[51] This

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[49] Transactional Records Access Clearinghouse ("TRAC"), HUGE INCREASE IN TRANSFERS OF ICE DETAINEES (2009), *available at* http://trac.syr.edu/immigration/reports/220/. Almost half of all detainees transferred are transferred multiple times—there are now more transfers than there are detainees. *See id.*

[50] *See Matter of Rahman*, 20 I. & N. Dec. 480, 485 (BIA 1992) (holding that distant location of attorney did not require immigration judge to grant motion for change of venue); Markowitz, *supra* note 48, at 558 n.80 (collecting cases); Locked Up, *supra* note 48, at 62 ("[C]ourts have consistently held that the location of a detainee's attorney . . . is insufficient cause for change of venue.").

[51] TRAC Report, *supra* note 49; *see also* Department of Homeland Security, OIG-09-41, Immigration and Customs Enforcement's Tracking and Transfers of Detainees, 8 (March 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-41_Mar09.pdf ("Detainees may be transferred anywhere in the United States, depending on a facility's space availability."). ICE acknowledges that "significant detention shortages exist in California and the Mid-Atlantic and Northeast states. When this occurs, arrestees are transferred to areas where there are surplus beds." DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (Oct. 2009), *available at* http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf. Most of these transferred detainees "are sent

makes it that much more difficult to gather and present evidence in immigration proceedings that would speak to the validity or even the existence of a prior conviction.

III. The Fifth Circuit's Position Will Place A Substantial And Unwarranted Burden On The Criminal Justice System.

The massive and growing number of low-level drug possession prosecutions imposes a huge burden on the criminal justice system. To ensure that courts do not become overwhelmed addressing low-level offenses at the expense of more serious offenses, state governments have taken measures to alleviate these burdens. If affirmed, the Fifth Circuit's decision will frustrate these measures and have a profound impact on courts' abilities to ensure proper functioning of state criminal justice systems.

One necessary tool in the efficient administration of justice is plea bargains.[52] Guilty pleas not only substantially reduce the number of time-consuming and costly trials, but also the resulting bargained-for sentences take significant pressure off penal institutions by decreasing the amount of time they must house and care for defendants. The latest U.S. Sen-

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from eastern, western and northern state detention facilities to locations in the southern and southwestern United States." DEPARTMENT OF HOMELAND SECURITY, OIG_10-13, IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 1 (Nov. 2009), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-13_Nov09.pdf.

[52] *See, e.g.*, *Santobello v. New York*, 404 U.S. 257, 261 (1971) (referring to plea bargains as "not only an essential part of the process but a highly desirable part for many reasons").

tencing Commission Annual Report reflects that, in 2008, 97.7 percent of all federal prosecutions for simple possession ended with plea bargains.[53]

For drug possession offenses, the distinction between simple and recidivist offenses serves an important role in plea bargaining. When a defendant is potentially chargeable with recidivist possession, the prosecutor can offer and the defendant can accept the reduced charge and lower sentence that comes with a simple possession charge.

But the Fifth Circuit's decision denies state and local prosecutors the benefit they can offer by reducing the charge in the case of immigrants charged with a second possession offense. In the Fifth Circuit, where a conviction for low-level simple possession is treated the same as a conviction for recidivist possession, even an immigrant convicted of low-level simple possession will face the severest immigration consequences—including classification as an "aggravated felon" and the resulting expedited removal proceedings, denial of all possible eligibility for cancellation of removal and asylum, and a permanent prohibition on re-entering the United States.

These immigration consequences will almost always far outweigh the immediate benefits of a guilty plea to non-recidivist possession. Because the Fifth Circuit's interpretation of the "aggravated felony" statute treats a second simple possession offense and a recidivist offense as the same, prosecutors and defendants must likewise treat them the same where the defendant is a non-citizen, even if the effect is to increase unnecessary burdens on already overtaxed

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[53] U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Table 11 (2008), *available at* http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm.

courts and detention centers. The Fifth Circuit gives the immigrant defendant little choice but to fight the possession charge, even if it means taking the case to trial. The few who plead guilty will likely be those who do not understand the risk of doing so. As this Court has recognized: "Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions' immigration consequences."[54]

In light of the federal policy of encouraging guilty pleas and the sound exercises of prosecutorial discretion in that process, it is unlikely that Congress intended this result. Under federal law, plea bargaining is incentivized by the U.S. Sentencing Guidelines,[55] and federal judges likewise encourage guilty pleas by generally accepting a prosecutor's sentence recommendation or otherwise imposing lower sentences on defendants who plead guilty.[56]

Indeed, as noted above, the desire to facilitate guilty pleas, and thereby relieve burdens on the federal criminal justice system, is the primary factor in

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[54] *INS. v. St. Cyr*, 533 U.S. 289, 321 (2001); *see also Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999) ("That an alien charged with a crime involving controlled substances would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented.").

[55] U.S. SENTENCING COMMISSION, U.S. SENTENCING GUIDELINES MANUAL 3E1.1 (2009) (giving a two-point reduction for acceptance of responsibility, plus a third point for a timely guilty plea where the adjusted offense level is sixteen or higher).

[56] Bibas, *supra* note 5, at 1153.

a federal prosecutor's decision to forgo recidivist prosecutions under Section 851. Accordingly, as described *supra* at Section I.A., only a relatively small number of defendants who could be prosecuted for felony recidivist possession ever face such a charge.

Moreover, most states make use of specially enacted drug courts to handle many low-level possession offenses, allowing judges to make use of cost-effective alternatives to incarceration if the defendant is prepared to plead guilty or otherwise admit to facts sufficient for a conviction. These dispositions may still be found to constitute a "conviction" for the purpose of 8 U.S.C. § 1101(a)(48)(A), which defines a "conviction" as "a formal judgment of guilt of the alien entered by a court" or "if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[57]

States first implemented these drug courts precisely because "[c]ourt dockets became overloaded with drug cases and drug-involved offenders, leaving fewer resources available to adjudicate serious, violent felonies."[58] And states have increasingly turned to them as an effective way to manage their criminal

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[57] *See Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute despite successful completion of probation leading to Idaho vacatur of the plea).

[58] DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (1998), *available at* http://www.ncjrs.gov/html/bja/decade98.htm.

justice resources. There are currently 2,140 drug courts in use and another 284 in planning stages, representing a 32 percent increase since 2004.[59] The Fifth Circuit's approach would restrict these state efforts to manage their own criminal justice systems by undermining the usefulness of drug courts in the increasingly large number of cases involving non-citizen defendants.

This Court recently reaffirmed, in the sentencing context, the important federalism principles that the decision below frustrates: "Beyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status. We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so."[60] Because Section 1101(a)(43)(B) operates within a framework of plea bargains, prosecutorial discretion, and deference to states' efforts to administer their own criminal justice systems, Congress should not be understood, without some express directive, to have so severely burdened the states' criminal justice systems

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[59] OFFICE OF NATIONAL DRUG CONTROL POLICY, DRUG COURTS, http://www.whitehousedrugpolicy.gov/enforce/DrugCourt.html (last visited Aug. 10, 2009); C. WEST HUDDLESTON, III, ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING-COURT PROGRAMS IN THE UNITED STATES 1 (2008), *available at* http://www.ndci.org/sites/default/files/ndci/PCPII1_web%5B15D.pdf.

[60] *Oregon v. Ice*, 129 S. Ct. 711, 718-719 (2009) (internal citations omitted); *see also id.* at 719 ("We will not so burden the Nation's trial courts absent any genuine affront to [constitutional principles].").

and hampered their ability to legislate and exercise their considered judgment in such matters.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

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AMICUS CURIAE BRIEF

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JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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INTEREST OF *AMICI CURIAE*

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD's members represent many indigent defendants who will be directly affected by the Court's decision in this case, including defendants subject to prosecution for illegal reentry under 8 U.S.C. § 1326.

Families Against Mandatory Minimums ("FAMM") is a national non-profit organization whose primary mission is to promote fair and proportionate sentencing policies, and to challenge excessive penalties required by inflexible mandatory minimum sentencing laws. Founded in 1991, FAMM has over 24,500 members, many of whom are prisoners serving mandatory minimum sentences, or their family members. In addition to advocating for change through the legislative process, FAMM participates in precedent-setting legal cases like this

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

one. FAMM's interest lies in ensuring that courts construe and apply mandatory minimum sentencing laws in a manner consistent with statutory and constitutional principles.

Amici are particularly concerned that the decision of the Fifth Circuit Court of Appeals in this matter, if allowed to stand, could lead to dramatically increased criminal sentences for noncitizen defendants in § 1326 cases in a manner that is contrary to congressional intent with respect to the treatment of recidivists, and that would result in dramatic and unjustified disparities between state-law and federal-law misdemeanants.

SUMMARY OF ARGUMENT

A person is an aggravated felon, within both the immigration and criminal contexts, if that person is convicted of "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43). Section 924(c) defines "drug trafficking crime" as a "felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). The plain language of § 924(c) requires that the individual have been convicted of an offense that would be a felony under federal criminal law. Any argument that a conviction of a federal misdemeanor is transformed into a felony for purposes of the Controlled Substances Act ("CSA") simply because the misdemeanor could have been charged as a felony is misplaced. A person convicted, pursuant to 21 U.S.C. § 844(a), of a drug possession misdemeanor (and not as a recidivist felon) has not been convicted

of a "drug trafficking crime" under § 924(c) and is therefore not an aggravated felon. While possession can be prosecuted as a felony under § 844(a), doing so requires that the defendant be charged as a recidivist and that a finding of the prior offense and its validity be made in the subsequent case.

Under the government's reading of 8 U.S.C. § 1101(a)(43), however, a person who is convicted of a state misdemeanor for drug possession after a prior possession conviction has become final automatically and always is an aggravated felon, regardless of whether the validity, the finality or even the fact of the prior conviction was established as part of the state proceeding.

The government contends that this result is warranted because had the person in question been convicted in federal court, the federal prosecutor *could have* prosecuted the person as a recidivist under 21 U.S.C. § 844(a). However, the government's reading contravenes Congress's direction that the prosecution of a person for felony recidivist possession under § 844(a) is not automatic. Section 844(a) requires a finding that the recidivist conviction occurred "after . . . a prior conviction" under federal or state controlled substances law "has become final." 21 U.S.C. § 844(a). In addition, the government's reading ignores the import of 21 U.S.C. § 851, a statute which makes recidivist prosecution turn on the exercise of prosecutorial discretion and which provides strict statutory safeguards on the use of prior convictions to enhance penalties.

Prior to 1970, federal prosecutors were required by statute to charge recidivism. Recognizing that not all recidivist offenders merited such treatment, Congress reversed this default presumption by enacting 21 U.S.C. § 851 and gave federal prosecutors the discretion to decide which offenders should be prosecuted as recidivists. And, indeed, the experience of *amicus* NAFD is that federal prosecutors frequently exercise their discretion not to insist on recidivist convictions under § 851. The government's reading stands Congress's instruction, which is consistent with *amicus*'s experience of federal practice, on its head, effectively treating recidivist enhancements as if they were automatic and mandatory.

The government's argument also ignores the substantive safeguards that Congress established regarding the use of prior convictions to enhance sentences. Section 851 creates a mandatory, non-waivable requirement that a prosecutor take the affirmative step of filing an information stating the prior conviction(s) on which the prosecutor relies in exercising the discretion to seek a recidivist enhancement. And, Section 851 requires courts to find the fact, validity, and finality of the conviction beyond a reasonable doubt as part of the proceeding. If a prosecutor fails to comply with § 851, the sentence may not be enhanced.

The government's interpretation would nullify these requirements and safeguards by deeming a state conviction for simple possession to be a recidivist drug felony, and therefore an aggravated

felony, even though the defendant was not prosecuted as a recidivist in the state proceeding.

The government's reading also creates gross and unwarranted disparities in the treatment of federal and state misdemeanants in the illegal reentry context. Under the government's approach, a two-time, state-law misdemeanant who illegally reenters the United States and is convicted under 8 U.S.C. § 1326 faces penalties that are ten times greater than a two-time, federal-law misdemeanant who has been convicted of similar offenses. Furthermore, if a person has one federal and one state drug possession misdemeanor, the maximum sentence for an illegal reentry conviction differs drastically based solely on which conviction came first: if the state conviction was followed by a federal conviction, the maximum would be two years, but if the order of the convictions were reversed, the maximum would be twenty years. There is no evidence that Congress intended such a disparate result and no plausible justification for such a disparity.

Assuming *arguendo* that the government's reading of the aggravated felony drug trafficking provision were plausible, at most this provision is ambiguous. The criminal rule of lenity would require adoption of the narrower interpretation and rejection of the government's impermissibly broad interpretation. The government's interpretation does not satisfy the rule of lenity's requirements that defendants be given fair warning of what conduct is illegal and what punishments arise from illegal conduct. To determine that every state defendant

who is facing a second or subsequent drug possession misdemeanor conviction has fair warning that in the eyes of the federal government he is now an aggravated felon is unsustainable.

ARGUMENT

I. The "Aggravated Felony" Drug Trafficking Provision, 8 U.S.C. § 1101(a)(43)(B), Has Both Immigration and Criminal Law Applications.

Petitioner Jose Angel Carachuri-Rosendo was found subject to mandatory deportation based on the Board of Immigration Appeals' determination that it was required under Fifth Circuit precedent to conclude that Petitioner's Texas misdemeanor conviction for possession of a tablet of Xanax constituted an "aggravated felony" because Petitioner had a prior misdemeanor conviction for possession of marijuana, even though the fact of that conviction was not charged or found in the subsequent misdemeanor case. The Fifth Circuit Court of Appeals affirmed, and this Court granted certiorari to determine whether a person convicted under state law for simple drug possession has been "convicted" of a drug trafficking "aggravated felony" within the meaning of the Immigration and Nationality Act because he *could have been* prosecuted for recidivist simple possession (a federal law felony) even though there was no charge or finding of a prior conviction in the subsequent prosecution for possession.

Like other aggravated felony definitional provisions, the drug trafficking aggravated felony provision, 8 U.S.C. § 1101(a)(43)(B), is located at the

intersection of immigration law and criminal law. In the immigration context, conviction of an aggravated felony renders a noncitizen subject to mandatory deportation and other immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (deportable); *id.* §§ 1229b(a)(3), 1229b(b)(1)(C) (cancellation of removal unavailable); *see also, e.g.*, *id.* § 1226(c) (mandatory detention). In the criminal context, prior conviction of an aggravated felony exposes a noncitizen to a far greater maximum prison sentence than other types of prior convictions if the noncitizen is subsequently convicted of illegal reentry after deportation based on the prior conviction. The illegal reentry statute, 8 U.S.C. § 1326, provides for a graduated sentencing scheme of increasing statutory maximums, the highest of which – 20 years' imprisonment – is triggered by a prior conviction for an aggravated felony. 8 U.S.C. § 1326(b)(2). Also, under the United States Sentencing Guidelines, the statutory concept of "aggravated felony" is utilized in the application of a steep offense level increase, regardless of what may have been charged in the indictment. U.S.S.G. § 2L1.2(b)(1)(C) & appl. note 3 (comment).

Pursuant to the teachings of this Court, a dual-use statute such as the aggravated felony definitional provision at issue here generally must be interpreted consistently as between the two contexts in which it applies. This dual-use principle was nowhere made more evident than in this Court's decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006). *Lopez* concerned whether an offense that is a felony under state law but a misdemeanor under federal

law qualifies as an aggravated felony triggering mandatory deportation. At the same time that the Court granted certiorari in *Lopez*, it also did so in *Toledo-Flores v. United States*, 547 U.S. 1054 (2006), an illegal re-entry sentencing case raising the same statutory construction question. *Toledo-Flores* was subsequently dismissed as moot, but the *Lopez* decision clearly reflected the Court's intent that the holding would apply consistently in the immigration and criminal contexts. *Lopez*, 549 U.S. at 52 n.3 (citing and abrogating a series of both immigration removal and criminal sentencing cases).

As explained herein, the government's proposed reading of the drug trafficking aggravated felony definition cannot be squared with Congress's intent with respect to when an individual may be deemed to have been convicted of a recidivist drug offense, and therefore of an aggravated felony, for purposes of federal criminal and immigration law.

II. To Deem a Second State-Law Misdemeanor Possession Conviction As Automatically Constituting an Aggravated Felony Contravenes the Federal Statutory Scheme and Is in Tension With Federal Practice Pursuant to Which Few Federal Recidivists Are Prosecuted as Felons.

The INA defines "aggravated felony" to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43). In turn, 18 U.S.C. § 924(c) defines a "drug trafficking crime" to include "any felony punishable under the

Controlled Substances Act." 18 U.S.C. § 924(c)(2). At issue in this case is whether a second state-law misdemeanor drug possession offense automatically meets the definition of an aggravated felony because it *could have been* punished as a felony under federal law. *Amici* contend that the government's approach of treating second-time state-law misdemeanants automatically as recidivists, and therefore as felons, contravenes the statutory scheme because 1) Congress has directed that the prosecution of a second-time misdemeanant as a recidivist felon under federal criminal law should be a matter of prosecutorial discretion and is subject to strict statutory safeguards; and 2) the government would treat state-law defendants differently from federal-law defendants when Congress has sought to treat them alike.

A. A Second Simple Possession Conviction Is Not a Felony Under Federal Criminal Law Unless the Fact, Finality and Validity of a Prior Possession Conviction Have Been Established in the Second Criminal Proceeding.

Under the Controlled Substances Act, a first drug possession conviction is a misdemeanor. *See* 21 U.S.C. § 844(a) (authorizing maximum sentence of one year for first-time offense); 18 U.S.C. § 3559(a)(6)-(8) (classifying an offense as a misdemeanor where the maximum authorized prison term is one year or less, but more than five days). A second or subsequent drug possession conviction, including one following a prior state conviction, can

be either a misdemeanor or a felony.[2] Under the terms of § 844(a), in order for such a conviction to be a felony it must be obtained "after . . . a prior conviction" under federal or state controlled substances law "has become final." 21 U.S.C. § 844(a). Thus, there must necessarily have been a finding as to the existence of the prior conviction in the subsequent proceeding. *See id.*

Moreover, a second or subsequent possession conviction under § 844(a) cannot be treated as a felony under federal law unless the fact, finality and validity of a prior possession conviction have been established in the second or subsequent case in compliance with 21 U.S.C. § 851. "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions," unless the prosecutor files an information stating the prior conviction to be relied upon and the court determines that the person has been convicted as alleged in the information and that the conviction is valid. 21 U.S.C. § 851(a)(1). Any factual dispute in this regard must be resolved by the court, after a hearing, upon the introduction of actual evidence, with the government bearing the burden of proof beyond a reasonable doubt. *Id.*[3]

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[2] Section 844(a) enumerates several exceptions to this general rule, such as possession of a certain amount of a mixture or substance containing cocaine base, which are felonies even for first-time offenders. None of these exceptions are relevant to this case.

[3] *Cf.* 21 U.S.C. § 850 (other sentencing disputes in a drug case may be resolved upon "information," not necessarily evidence, and with proof meeting a mere preponderance standard).

Only if the prosecutor complies with § 851 and the sentencing court determines that there was a prior valid conviction does the maximum punishment under § 844(a) for a second conviction increase to two years, making the conviction a felony. *See* 18 U.S.C. § 3559(a)(1)-(5) (classifying offense as a felony where maximum authorized prison term is more than one year).[4]

If a prosecutor chooses not to pursue charging the defendant as a recidivist in accordance with § 851, or if the sentencing court determines that the prosecution has not proven the fact of a prior valid conviction beyond a reasonable doubt, *see* 21 U.S.C. § 851(c)(1); *see also, e.g.*, *United States v. Green*, 175 F.3d 822, 835-36 (10th Cir. 1999); *United States v. Kellam*, 568 F.3d 125 (4th Cir.), *cert. denied*, 130 S. Ct. 657 (2009), then the maximum punishment under § 844(a) for a second drug conviction remains one year, making the conviction a misdemeanor. *See* 18 U.S.C. § 3559(a)(6); *United States v. LaBonte*, 520 U.S. 751, 754 n.1 (1997) (explaining that without proper notice under § 851, "the lower sentencing range [i.e., one year or less] will be applied even

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[4] In fact, not even all second-time violators of § 844 are eligible to be prosecuted for a felony. That is because under the Federal First Time Offense Act, 18 U.S.C. § 3607, a court may place a first-time violator of § 844 on probation "without entering a judgment of conviction." So long as that person does not violate the conditions of probation, the court will "without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation." 18 U.S.C. § 3607(a). Because this disposition cannot "be considered a conviction . . . for any . . . purpose," many second-time violators of § 844 can be prosecuted only for a misdemeanor.

though the defendant may otherwise be eligible for the increased penalty"); *Price v. United States*, 537 U.S. 1152, 1235 S. Ct. 986, 989 (2003) (Scalia, J., dissenting) (noting the government's concession that "petitioner's drug possession offense could not be treated as a felony . . . given the government's failure to file a notice of enhancement under 21 U.S.C. § 851(a)") (quotation marks omitted); *Steele v. Blackman*, 236 F.3d 130, 137 (3d Cir. 2001) (explaining that a second violation of § 844 "is not inherently a felony under federal law"). Indeed, the Government has previously acknowledged that "[a] drug possession offense is punishable as a felony under the Controlled Substances Act by virtue of the defendant's recidivism only if the government has filed a notice under 21 U.S.C. 851(a)." Brief for the United States in Opposition, at 12, *Price v. United States*, 537 U.S. 1152 (2003) (No. 01-10940). In effect, the default rule is that a second possession conviction under § 844(a) is a misdemeanor under the CSA.

Because a second misdemeanor possession conviction is not automatically a felony absent a finding that it comes "after a prior conviction," 21 U.S.C. § 844(a) – a finding that must be sought by the prosecutor and rendered in accordance with § 851 – such a conviction is also not an aggravated felony. As explained in more detail in Petitioner's brief, *see* Pet. Br. 20-21, and as held by this Court in *Lopez*, 549 U.S. at 57, a defendant has a "conviction" for a "drug trafficking crime," and therefore for an aggravated felony, when he has been convicted of a "felony punishable under the [CSA]." 18 U.S.C.

§ 924(c)(2). This language thus requires a conviction of an offense that would be a felony under federal law. Any argument that a second misdemeanor conviction under § 844(a) qualifies as a drug trafficking crime because it *could* have been charged as a felony is misplaced. The CSA's plain language does not support treating a conviction for an offense that would constitute only a federal drug misdemeanor as a federal drug felony.

B. Prosecution of Second-Time Possession as Felony Recidivist Possession Is a Matter of Prosecutorial Discretion and Is Subject to Strict Limitations, With the Result that Few Federal Second-Time Offenders Are Convicted as Felons.

Congress chose to give prosecutors the discretion to seek recidivist enhancements in drug cases, and in so doing required that a defendant be accorded substantive protections before a prior conviction may be used to increase the sentence attendant to a subsequent conviction. As a result, in the case of § 844(a), a second possession conviction is rendered a felony rather than a misdemeanor if, but only if, the second conviction was obtained in accordance with these protections. The Government's position that all persons convicted in state court of drug possession – conduct punishable only as a misdemeanor under § 844(a) – after a prior conviction for such possession are automatically and always aggravated felons contradicts the clear congressional scheme regarding recidivist enhancements under the CSA.

At one time, prosecutors were required to charge recidivism and federal courts were required to sentence defendants as recidivists unless the defendant could prove that a prior conviction did not exist. *See* 26 U.S.C. § 7237(c)(2) (1970) (providing that prosecutors "shall file an information setting forth the prior convictions"); *United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002). "The thrust of [this] prior law, which required minimum sentences, was mandatory enhancement." *United States v. Noland*, 495 F.2d 529, 532 (5th Cir. 1974). A federal prosecutor "was required to advise the court whether the defendant was a first offender. The court was required to enhance the sentence of a multiple offender[.]" *Id.*

Recognizing that not all recidivist drug offenders merited such treatment, in 1970 Congress reversed this default presumption. Instead of requiring recidivist prosecutions and their attendant sentencing enhancements, Congress gave federal prosecutors discretion to decide which drug offenders should be prosecuted as recidivists. *See Dodson*, 288 F.3d at 159 ("One goal of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which 21 U.S.C. § 851 is a part, was to make the penalty structure for drug offenses more flexible."). Absent the government's affirmative filing of an information under § 851, the recidivist penalty would not apply.

The introduction of the element of prosecutorial discretion represented a sharp break with previous law and practice. The earlier statute was silent as to the effect of a failure to timely file an information

giving notice of the prior conviction, and as a result had been interpreted by numerous courts of appeals as allowing the trial court to deem failure to timely file an information giving notice of the conviction(s) to be harmless error. *See United States v. Severino*, 316 F.3d 939, 953-54 (9th Cir. 2003) (Thomas, J., dissenting) (citing cases). The error could be deemed harmless because the default rule under the prior regime was that the defendant was to be prosecuted as a recidivist – just the opposite of current law. When Congress enacted § 851, it made a dramatic change in the federal drug laws, conditioning prosecution of a defendant as a recidivist (and therefore exposure to increased prison time) on a mandatory, non-waivable requirement that the prosecutor must exercise discretion to file an information stating the conviction or convictions to be relied upon, and on a requirement that the conviction be found to exist and to be valid by the court. The new law changed the default rule.

By making this change, Congress limited the scope of drug offenses subject to recidivist treatment under the CSA. In the § 844(a) context, the result of the statutory regime established by Congress is that an offender cannot be convicted as a felon based on a second or subsequent simple possession charge unless the prosecutor has chosen to pursue recidivist prosecution and has complied with the prerequisites of § 851. This is no mere formality: sentencing enhancements have been reversed due to the government's failure to comply with this statute. *See, e.g.*, *Green*, 175 F.3d at 835-36 (finding insufficient proof for enhancement where

government produced no physical evidence such as fingerprints or photographs to show that the persons previously convicted were the same person as defendant); *Kellam*, 568 F.3d at 144-45 (finding insufficient proof of prior conviction for enhancement where discrepancies in records of alleged prior meant government could not meet its burden to prove it was the same defendant).

In the experience of *amicus* NAFD, federal prosecutors frequently exercise their discretion not to insist on recidivist enhancements under § 851. In most relevant instances, prosecutors threaten to charge defendants with recidivist enhancements to encourage those defendants to plead to unenhanced charges. *Amicus* NAFD is aware of few, if any, § 844(a) cases in which the recidivist enhancement has been applied.

This prosecutorial approach is consistent with the Department of Justice's charging policies. The DOJ's general policy requires that federal prosecutors charge and pursue the most serious, readily provable offense. U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.300(B) (1997); *see also* Memorandum from [Attorney General] John Ashcroft to all Federal Prosecutors Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003) ("Ashcroft Memo"), *reprinted in* 16 Fed. Sent. R. 129, 130. There are a limited number of exceptions to this policy, one of which is for statutory enhancements, including specifically recidivism enhancements like § 851. United States Attorneys' Manual § 9-27.300(B); *see also* Ashcroft Memo,

reprinted in 16 Fed. Sent. R. at 131 ("As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement [as § 851]. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant . . . will have no incentive to plead guilty . . . . Accordingly, [authorization may be given to] a prosecutor to forgo the filing of a statutory enhancement . . . in the context of a negotiated plea agreement."). Although they are encouraged to seek enhancements in appropriate cases, federal prosecutors may (and as just explained, frequently do) decline to charge a defendant as a recidivist "after giving consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity." Ashcroft Memo, *reprinted in* 16 Fed. Sent. R. at 131.

C. The Government's Approach Contravenes Congressional Intent Regarding Recidivist Enhancements.

In *Lopez*, this Court acknowledged Congress's intent that federal and state offenses be treated consistently for purposes of the INA's aggravated felony provision and, more specifically, that Congress intended that in order to constitute a drug trafficking aggravated felony the offense of conviction must be punishable as a felony under the CSA. *Lopez*, 549 U.S. at 57. Yet, under the government's approach here, any individual convicted in state court of simple drug possession

automatically would be deemed an aggravated felon if that conviction came after a previous possession conviction. The government's position cannot be reconciled with *Lopez*, because it would automatically treat a state possession conviction as if it were a federal felony in circumstances in which a federal possession conviction would be a federal misdemeanor, a result contrary to the CSA definitions that Congress made controlling. Moreover the government's position contravenes Congress's intent that a second-time misdemeanor drug offender is not a felon within the meaning of federal criminal law where there has been neither a charge nor finding of a prior drug possession offense in the subsequent drug possession proceeding. To contend that a second-time misdemeanant is an aggravated felon because the defendant "could have" been prosecuted as a felon under federal law is to upend the federal statutory regime, in which the default rule is that such an individual is a misdemeanant not a felon.

Moreover, although § 851 is best understood as a substantive limitation by Congress on the scope of recidivist drug prosecutions under the CSA, it should not be overlooked that the provision also serves an important due process function by requiring the defendant be provided with notice and an opportunity to be heard with respect to the fact and validity of the prior conviction upon which the government seeks to rely to charge the defendant as a recidivist. This Court has recognized, including with respect to state-law prosecutions, that due process requires "reasonable notice and an

opportunity to be heard relative to [a] recidivist charge." *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *see also id.* at 454 ("[W]e may assume that any infirmities in the prior convictions open to collateral attack could have been reached in the recidivist proceedings, either because the state law so permits or due process so requires.") (footnote omitted). Yet the government contends that an individual may be subjected to the consequences of being deemed a recidivist felon, including, in the criminal law context, to a maximum prison term for illegal reentry that is ten times greater than would otherwise apply, without there having been any notice and opportunity to be heard on the recidivist issue in the underlying criminal proceeding. This result is inconsistent with the right to due process, a right which Congress has recognized in its federal recidivist scheme.[5]

D. The Government's Reliance on *Almendarez-Torres* Is Misplaced and Ignores Important Functions of § 851 in the Statutory Scheme at Issue Here.

Relying on this Court's ruling in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the government denies the importance under federal criminal law of establishing the fact of a prior

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[5] As discussed by *amici* the National Association of Criminal Defense Lawyers, *et al.*, the vast majority of states also have recidivist possession statutes that require a finding of recidivism, with some form of notice and opportunity to be heard on the issue, before the defendant can be convicted as a recidivist. *See* Br. for *Amici Curiae* NACDL, *et al.* at I.B.

conviction in the criminal proceeding in order to convict a defendant as a recidivist drug offender. *Almendarez-Torres* addressed a different question, namely, whether as a matter of due process a prior conviction must be charged in the indictment and proven beyond a reasonable doubt to a jury in order to trigger a sentencing enhancement. *Almendarez-Torres* held that due process does not require that a prior conviction be deemed an "element" of a crime that must be charged and proven to a jury. It was implicit within the Court's holding, however, that somewhere within the judicial process there had to be a determination as to the existence and validity of the prior conviction, indeed, with potentially a heightened standard of proof required. *See* 523 U.S. at 248. To automatically deem a state-law defendant to be an aggravated felon based upon a prior misdemeanor conviction would be to abrogate this vital part of the judicial process, since neither a removal proceeding nor a § 1326 illegal reentry prosecution would afford any opportunity for such a determination. That is why § 851 plays such a crucial part in distinguishing between a felony conviction and a misdemeanor conviction under § 844.

Although not necessary to resolve this matter, *amici curiae* respectfully submit that this case provides just one more reason to revisit and overturn *Almendarez-Torres*, a decision which this Court has acknowledged may have been wrongly decided. *See Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000). If a prior conviction were properly considered to be a constitutional element of the offense of recidivist

possession, there would be no doubt that the *Taylor* approach would apply here to assess whether the underlying state conviction constitutes an aggravated felony. Under *Taylor v. United States*, 495 U.S. 575 (1990), when determining whether an individual convicted of drug possession had in fact been convicted of recidivist possession, and therefore of an aggravated felony, the immigration court (in the removal context) or the sentencing court (in the illegal reentry context) would look to the elements of the offense of conviction. Only if one of the elements charged and proven was the fact of a prior conviction could the conviction be deemed an aggravated felony. *See generally id.* at 599. This Court would not have had need to hear this case, as it would have been disposed of easily under *Taylor*: Petitioner's state-law misdemeanor conviction for possession of Xanax did not have a prior conviction as an element.

III. The Government's Interpretation Would Lead To Arbitrary and Impermissible Disparities in Sentencing for the Federal Crime of Illegal Reentry Based Solely on Whether a Defendant's Prior Misdemeanor Drug Convictions Were Obtained in Federal or State Court.

In addition to the concerns articulated above about the contravention of Congress's statutory scheme for recidivism, *amici curiae* are particularly concerned about the effect of the government's position in the illegal reentry context. Under the government's approach, a two-time state-law drug misdemeanant who illegally reenters the United

States faces penalties that are ten times greater than a two-time federal-law drug misdemeanant. This drastic and unjustifiable disparity between individuals who have committed the exact same offenses provides further compelling evidence that Congress did not intend to automatically treat second-time, state-law possession convictions as aggravated felonies.

Congress has established a graduated sentencing scheme for individuals convicted of illegally reentering the United States. *See* 8 U.S.C. § 1326. Pursuant to that scheme:

(1) the base maximum sentence is two years in prison, *id.* § 1326(a);

(2) if the reentry was subsequent to three or more misdemeanors convictions "involving drugs, crimes against the person, or both," or any felony conviction, the maximum sentence increases to ten years in prison, *id.* § 1326(b)(1); and

(3) if the reentry was subsequent to an aggravated felony conviction, the maximum sentence increases to twenty years in prison, *id.* § 1326(b)(2).

The government's interpretation of the aggravated felony provision's drug trafficking definition upends this congressional sentencing scheme. Under the government's view, a person with two state misdemeanor possession convictions who violated § 1326 could receive a maximum of twenty years based upon having a prior aggravated felony

conviction. But if that same individual had two *federal* misdemeanor possession convictions the maximum sentence for a § 1326 violation would be only two years.

Perhaps even more surprising is the disparate treatment of individuals with one state and one federal misdemeanor possession conviction. If a person was convicted of a state misdemeanor first and then convicted of a federal misdemeanor, that person could receive at most a two-year sentence for a § 1326 violation. However, if that person was convicted of the federal misdemeanor first, followed by the state misdemeanor, the government's interpretation would result in that person receiving up to twenty years in prison for a § 1326 violation.[6]

There is no evidence that Congress intended such a disparate result between similarly situated state and federal misdemeanants, and no plausible justification for such a disparity. The purpose of treating analogous state law offenses as equivalent to federal felonies is to promote uniformity. *Cf. Lopez*, 549 U.S. at 58 (explaining that "Congress has apparently pegged the immigration statutes to the [federal criminal law] classifications Congress itself chose"). In enacting the aggravated felony provision,

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[6] The advisory Sentencing Guidelines likewise provide that a defendant convicted of illegal reentry receives an 8-level enhancement based on a prior aggravated felony conviction. *See* U.S.S.G. § 2L1.2(b)(1)(C). While this enhancement may not yield disparities in advisory sentencing ranges as large as with the statutory maximums, the disparities nevertheless remain substantial – typically a doubling, more or less, of the recommended sentence. *See* U.S.S.G. pt. 5.A (table).

Congress could not have wanted to create such an unwarranted disparity in sentencing for illegal reentry between state and federal offenders who have exactly the same type of prior convictions.

The legislative history of § 1326 further supports the argument that Congress did not believe that two misdemeanor drug convictions were equivalent to an aggravated felony. Section 1326 originally provided increased penalties only for those defendants with a prior felony or aggravated felony conviction. *See* 8 U.S.C. § 1326 (1998). In 1994, Congress amended this sentencing scheme to add increased penalties for three prior misdemeanors, now codified at § 1326(b)(1). *See* Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (1994). Such an addition of "three misdemeanors involving drugs" would have been unnecessary if two drug misdemeanors already constituted an aggravated felony.

Moreover, it is hardly surprising that Congress would not deem a second drug misdemeanor to be an aggravated felony. Those charged with simple possession of drugs, whether in state or federal court, are typically addicts or other habitual users, as opposed to dealers. Congress properly refrained from punishing them as felons. Very few drug abusers, no matter how motivated, find it easy to break their illicit habit immediately after getting into trouble for the first time. The Court should not lightly infer that Congress intended a harsh and

unrealistic "two strikes and you're out" regime in this context.[7]

We note that, if the Government were to contend that a second federal misdemeanor conviction obtained under § 844(a) is itself an aggravated felony, even if the second conviction was not prosecuted as a felony under § 851, this would itself lead to absurd results. Section 1101(a)(43), through its incorporation of § 924(c), requires that the individual have been convicted of an offense that is a felony under federal law, which has not occurred in such a case. Perhaps even more telling, the § 1326 graduated sentencing scheme would be thrown awry. An illegal reentry defendant with two federal drug misdemeanors would be subject to a 20-year statutory maximum sentence even though § 1326 states that an illegal reentry defendant with three

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[7] The "drug trafficking crime" term that is incorporated into the aggravated felony definition at issue here also plays a role in other federal criminal law statutes, such as 18 U.S.C. § 924(c). Under § 924(c), a person "who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm" is subject to a 5-year minimum (consecutive) prison sentence. 18 U.S.C. § 924(c)(1); *see also id.* § 924(c)(2) (defining "drug trafficking crime" with reference to 21 U.S.C. § 801 *et seq.*, 21 U.S.C. § 951 *et seq.*, and chapter 705 of title 46). If the government's view of the "drug trafficking crime" term were applied to the § 924(c) context, it would mean that a 5-year *minimum* sentence would be triggered for an individual using or carrying a firearm merely by virtue of the fact that the person at the same time simply possessed (without distributing or possessing with intent to distribute) a controlled substance, so long as the person had a prior simple possession conviction. Nothing indicates that Congress intended such an absurd and textually unjustified result.

drug misdemeanor convictions is subject to only a 10-year maximum (meaning necessarily that those with fewer than three such convictions are subject not to the 20-year maximum for aggravated felons, but rather to the 2-year maximum for all others). Because such an argument regarding second federal misdemeanor convictions is untenable, our discussion of the unjustifiable disparity affecting state-law defendants assumes that a two-time federal misdemeanant is not, absent prosecution as a recidivist felon, an aggravated felon.

In sum, there is no reasonable justification for the large disparities in the sentences for illegal reentry between individuals convicted of the exact same misdemeanor offenses in federal and state court.

IV. The Criminal Rule of Lenity Further Requires Rejection of the Government's Interpretation Because of the Role Played by the Aggravated Felony Definition in the Criminal Illegal Reentry Statute.

Even assuming that the government's reading of the aggravated felony drug trafficking provision were plausible, that provision is at best ambiguous. This Court has recognized that a dual-use statute such as the aggravated felony definitional provision must be given a uniform meaning across the two contexts in which it applies, and that where there is ambiguity the criminal rule of lenity applies if the statute has criminal applications. For example, in *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004), this Court held in determining whether the individual in question was

an "aggravated felon" for purposes of immigration law that:

> we [are] constrained to interpret any ambiguity in the statute in petitioner's favor. Although we here deal with § 16 [the criminal law provision incorporated into the aggravated felony provision at issue] in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Id. at 11 n.8. Indeed, the question in *Leocal* is on all fours with the question raised in this case: the proper interpretation of a federal criminal law statute that is incorporated into an aggravated felony provision. *See id.*; *see also, e.g.*, *United States v. Santos*, 553 U.S. —, 128 S. Ct. 2020, 2030 (2008) (opinion of Scalia, Souter, Ginsburg, JJ.) (explaining that the rule of lenity provides powerful support for maintaining consistent meaning of words in statutes with multiple applications, "lest those subject to the criminal law be misled"); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality) (applying the rule of lenity in civil tax setting because the statute had criminal applications). As in *Leocal*, the criminal rule of lenity compels rejection of the government's reading of the aggravated felony provision at issue because that rule requires adoption of the narrower of two

plausible interpretations of an ambiguous criminal statute.

A. The Rule of Lenity Protects the Right To Fair Warning and the Separation of Powers.

The modern rule of lenity is a "canon of strict construction of criminal statutes," *United States v. Lanier*, 520 U.S. 259, 266 (1997), requiring that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). "[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). "Where it is doubtful whether the text includes the penalty, the penalty ought not be imposed." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J. concurring); *see also Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (explaining that "one is not to be subject to a penalty unless the words of the statute plainly impose it") (internal quotation marks omitted).

"Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). The first purpose has been interpreted as requiring that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain

line is passed. To make the warning fair, so far as possible the line should be clear." *Bass*, 404 U.S. at 348 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

The rule of lenity is also necessary to preserve the separation of powers. *Bass*, 404 U.S. at 348. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.* Before punishing an individual for his conduct, the rule of lenity "assur[es] that the society, through its representatives, has genuinely called for the punishment to be meted out." *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring) (quotation marks omitted). This policy embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (internal citations omitted). Even if statutory ambiguity "'effectively' licenses [the Court] to write a brand-new law, [the Court] cannot accept that power in a criminal case, where the law must be written by Congress." *Santos*, 128 S. Ct. at 2030-31.

B. Both Purposes of the Rule of Lenity Are Contravened by the Government's Reading.

Whether or not it is fair to assume that individuals do not read criminal statutes before acting in contravention of those statutes, fair warning of illegal conduct and corresponding punishment is nonetheless "required in any system of law." *See R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring). This requirement is especially strong in

the present scenario because the government's interpretation of the aggravated felony definition rests implicitly on the argument that a state drug misdemeanant has received fair warning that a second such conviction renders him a federal aggravated felon, with all of the resulting ramifications, even though the same conviction renders him simply a two-time misdemeanant in the eyes of the State of conviction. Furthermore, such a state defendant would only be a two-time misdemeanant if the same prosecution had been brought in federal court in the absence of the § 851 procedure.

Such an inconsistent and arbitrary result contradicts any notion of a meaningful fair warning. The contrast between the state two-time possession misdemeanant and the federal two-time possession misdemeanant, neither of whom was prosecuted as a recidivist, is exactly the kind of misleading of those subject to the criminal laws that the rule of lenity is intended to prevent. The need for consistency is highest when there are multiple consequences – in this case, both immigration and criminal – that arise from the same statutory provision. *See, e.g.*, *Santos*, 128 S. Ct. at 2030 (explaining that "the rule of lenity is an additional reason to remain consistent" in interpreting statutory provisions that have multiple applications, "lest those subject to the criminal law be misled").

There are simply too many variables in prosecuting state drug possession offenses to adopt the definition advanced by the government and

maintain any semblance of meaning in the concept of "fair warning." A state defendant might plead or be convicted at trial of a second state-law drug possession misdemeanor because the state prosecutor exercised discretion to not prosecute the individual as a felon under the state recidivist procedure, or even because such a procedure did not exist. As Justice Holmes noted, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also Bass*, 404 U.S. at 348 n.15 (noting the very real potential for a notice problem where federal law punishes conduct that state law permits); *United States v. Hayes*, 555 U.S. —, 129 S. Ct. 1079, 1093 (2009) (Roberts, C.J., dissenting) (explaining that "[i]f the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning").

To determine that a state defendant who has been convicted of a second drug possession misdemeanor has fair warning that, in the eyes of the federal government, he is now an aggravated felon, subject to all the attendant consequences including under § 1326, defies logic. It would also be inconsistent with the separation of powers.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER

v.

ERIC HOLDER, ATTORNEY GENERAL
OF THE UNITED STATES, RESPONDENT.

**On Writ Of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

BRIEF FOR ORGANIZATIONS REPRESENTING ASYLUM SEEKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BOTH 5 OF W6M

QUESTION PRESENTED

Whether a person convicted under state law for simple drug possession (a misdemeanor under federal law) may be deemed "convicted of" an "aggravated felony" for purposes of the Immigration and Nationality Act on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his state court prosecution for possession.

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INTRODUCTION

Amici curiae[1]—a group of organizations who represent or advocate for refugees and asylum seekers—respectfully submit this brief to alert the Court to the impact its decision may have on individuals fleeing persecution and on this Nation's compliance with its international treaty obligations.

When it acceded to the U.N. Protocol Relating to the Status of Refugees (the "Protocol"), the United States agreed that it would not use criminal conduct as a reason to deny asylum unless the refugee had been convicted of a "particularly serious crime" and thus "constitutes a danger to the community." In the years since then, this Nation has reaffirmed its commitment to the Protocol's principles, codifying its provisions in the U.S. Code.

The Fifth Circuit's interpretation of the Immigration and Nationality Act (the "INA") would lead inevitably to a violation of the Protocol. According to the Fifth Circuit, a refugee is deemed to have been convicted of an aggravated felony when he was in fact convicted only of misdemeanor possession of a controlled substance under state law—here, a single tablet of Xanax—because he *could have been* (but was not) prosecuted as a recidivist offender under federal law. A conviction for an aggravated felony—whether "deemed" or actual—is an automatic bar to asylum. It also operates as a presumptive bar to "withholding of removal"—the form of protection

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[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. No party or counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel has made a monetary contribution to the preparation or filing of this brief.

granted to a refugee if there is a clear probability that her life or freedom would be at risk if she returned to her home country. Under the Fifth Circuit's interpretation of the INA, then, an asylum seeker under these circumstances *must* be denied asylum and would presumptively be denied withholding of removal—even though she has never been convicted of anything approaching a "particularly serious crime" that would make her a "danger to the community."

This Court has long recognized that statutes should not be construed in a manner that would put the United States in violation of the law of nations, unless the language of the statute unambiguously compels such a result. See *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Even if the Fifth Circuit's reading of the relevant statutes here were permissible under their plain language, the inevitable conflict with this Nation's treaty obligations should compel rejecting such an interpretation.

INTEREST OF *AMICI CURIAE*

The National Immigrant Justice Center ("NIJC") is a program of the Heartland Alliance for Human Needs and Human Rights, a non-profit corporation headquartered in Chicago, Illinois. NIJC is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. By partnering with more than 1,000 attorneys from the nation's leading law firms, NIJC provides direct legal services to approximately 8,000 individuals annually. This experience informs NIJC's advocacy, litigation, and educational initiatives, as it

promotes human rights on a local, regional, national, and international stage.

The Advocates for Human Rights are a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, the organization today engages nearly 1,000 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provide pro bono legal assistance to indigent asylum seekers in the Upper Midwest. The organization has a strong interest in seeing that the United States construe legal protections for refugees and for those in danger of torture in a way that is consistent with international human rights standards in the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (the "Convention") and the Convention Against Torture.

The Immigrant Law Center of Minnesota is a Minnesota-based organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants. It represents asylees and refugees throughout Minnesota in removal proceedings before the immigration courts and the Board of Immigration Appeals.

The Immigrants' Rights Project of Public Counsel provides representation to individuals seeking asylum in the United States, representing clients from all over the world for whom the U.S. is the last

place of refuge and return to their home country may mean death or torture. Public Counsel is the largest pro bono public interest law firm in the world. Founded in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to the most vulnerable members of our community. Its staff of 39 attorneys and 5 social workers—along with thousands of volunteer lawyers, law students, and legal professionals—assist more than 27,000 low income children, youth, adults, and families each year.

Amici have a substantial interest in the issue now before the Court, both as advocates for the rights of refugees and asylum seekers generally and as providers of legal assistance to refugees and asylum seekers, either directly or through networks of pro bono attorneys. Given their experience and perspective, *Amici* are well-situated to assist the Court in understanding how the "aggravated felony" issue will impact individuals fleeing persecution, as well as how it will affect this Nation's compliance with its international treaty obligations concerning refugees.

STATEMENT

The case before the Court arises out of a complex web of statutory provisions that determines whether a person has been convicted of an "aggravated felony" for purposes of the INA. As discussed further below, the Court's interpretation of these provisions could have serious implications for refugees because of how that term is incorporated into the statutes relating to asylum and "withholding of removal."

As this Court recognized in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), a conviction for an aggravated felony

has more serious collateral consequences than a "felony conviction simple" because of how federal statutes and the Sentencing Guidelines incorporate the term "aggravated felony." *Id.* at 50. Under the INA, if a refugee is "convicted of" an "aggravated felony," she is categorically ineligible for asylum. 8 U.S.C. § 1158(b)(2); see also *Lopez*, 549 U.S. at 50-51. She is also presumptively ineligible for withholding of removal (8 U.S.C. § 1231(b)(3)), which means she can be returned to the country she fled for fear of persecution.

The INA defines the term "aggravated felony" as including

> * * * illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code).

8 U.S.C. § 1101(a)(43)(B).[2]

Although the INA does not define "illicit trafficking," Section 924(c)(2) of Title 18 defines "drug trafficking crime," a subcategory of illicit trafficking, as

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law

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[2] Section 102 of the Controlled Substances Act defines "controlled substance" in a manner not relevant here; it does not define the term "illicit trafficking." See 21 U.S.C. § 802.

> Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2).

In general, "trafficking" means "some sort of commercial dealing." *Lopez*, 547 U.S. at 53 (citing BLACK'S LAW DICTIONARY 1534 (8th ed. 2004)). Congress, however, "counterintuitively define[d] some possession offenses as 'illicit trafficking' . . . regardless of whether these federal possession felonies or their state counterparts constitute 'illicit trafficking in a controlled substance' or 'drug trafficking' as those terms are used in ordinary speech." *Id.* at 55 n.6. Among these crimes is a repeat possession offense under 21 U.S.C. § 844(a) where the prior conviction has been established and the requirements for a recidivist conviction set out in 21 U.S.C. § 851 have been met.

In the decision under review, the Fifth Circuit held that these statutory provisions, taken together, require that where conduct underlying a state simple possession misdemeanor conviction *could have been* charged as a federal recidivist possession felony, a court must "deem" the offender as having been "convicted of" an aggravated felony—even if that state misdemeanor has no element of illicit trafficking and notwithstanding that the offender was never charged with or convicted of recidivist possession. In the instant case, for example, Mr. Carachuri-Rosendo's state misdemeanor conviction for possessing a single tablet of Xanax was "deemed" a conviction of an "aggravated felony," because he had previously been convicted of misdemeanor possession and thus *could have been* (but was not) charged with recidivist possession.

Among other things, the Fifth Circuit's interpretation stretches the English language too far. Simply put, a "conviction" for the "aggravated felony" of "drug trafficking" cannot reasonably be understood to mean a conviction for misdemeanor possession of a minor quantity of drugs, even if the conviction was not a first offense. Moreover, and as discussed further below, even if these statutes could be read in this way, this Nation's obligations under the Protocol preclude such an interpretation.

SUMMARY OF ARGUMENT

The term "aggravated felony" has important implications for refugees. A refugee who has been convicted of an "aggravated felony" in the United States is automatically ineligible for asylum, without exception. 8 U.S.C. § 1158(b)(2)(B)(i). Additionally, an asylum applicant or other immigrant who has been convicted of an "aggravated felony" is presumptively ineligible for "withholding of removal"—the relief granted to a refugee whose life or freedom would be threatened if she were to be returned to her country of nationality. 8 U.S.C. § 1231(b)(3).

Allowing a misdemeanor possession conviction to be deemed a "conviction of" an "aggravated felony" simply because it was not a first offense, therefore, would have grave implications for this Nation's commitment to protect those who have fled from political, religious, and other kinds of persecution. Under the Fifth Circuit's decision, certain misdemeanor possession convictions would operate, among other things, as a categorical bar for a refugee seeking asylum. An immigration judge would have no discretion whatever to grant asylum in such a

case, regardless of how great the risk of persecution the refugee faces in her home country, or how long ago the offenses occurred. And a misdemeanor conviction for drug possession could mean that a refugee will be returned to a country where she will face a threat to her life or freedom.

When it acceded to the Protocol, the United States committed to providing certain substantive protections to refugees. Chief among these is the protection against "*refoulement*" to persecution—the return of the refugee to a place where her life or freedom would be threatened. Although the country of refuge may deny protection against *refoulement* based on criminal convictions, this bar is limited to those "who, having been convicted of a final judgment of a particularly serious crime, constitute[] a danger to the community of that country." CONVENTION, art. 33(2) (incorporated by reference and reproduction by the Protocol).

To adopt the Fifth Circuit's reading of the relevant statutes would put the United States in violation of its commitments under the Protocol and the Convention—a result that Congress presumptively did not intend. As this Court has recognized, a statute should not be construed in a manner that would put the United States in violation of its international treaty obligations unless the statutory language unambiguously compels that result. *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Thus, to the extent that these statutory terms are susceptible to more than one interpretation, the *Charming Betsy* doctrine provides an additional reason to adopt a reading that limits "conviction of" an "aggravated felony" to its plain meaning—and to eschew expansion of these common

terms to encompass a conviction for a simple possession misdemeanor that "could have been charged" as a recidivist offense.

In light of the impact of this issue on this Nation's treaty obligations and its own laws implementing those obligations—and in light of the impact the Court's decision will have on those who have fled persecution based on religion, race, nationality, membership in a social group, or political opinion—*Amici* urge this Court to reject the strained statutory interpretation adopted by the Fifth Circuit.

ARGUMENT

I. The United States has agreed to protect refugees from *refoulement* to persecution, and its statutes reflect that commitment.

Almost 40 years ago, the United States acceded to the Protocol Relating to the Status of Refugees. In so doing, the United States made a commitment to comply with the substantive provisions of Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees, developed in the aftermath of World War II. See *Immigration & Naturalization Serv.* v. *Stevic*, 467 U.S. 407, 416 (1984); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 8 (rev. ed. 1998). The United States was actively involved in drafting the Convention and creating an international refugee protection regime to ensure the protection of those who flee persecution.[3]

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[3] See Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950, at http://www.unhcr.org/refworld/publisher,AHCRSP,,,3ae68c1ac,0.html.

Article 33 of the Convention is incorporated into the Protocol by reference and reproduction. The first paragraph of Article 33 "provides an entitlement for the subcategory [of refugees] that 'would be threatened' with persecution upon their return." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Specifically, the first paragraph states:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

CONVENTION, art. 33(1). This is commonly known as the protection of "non-*refoulement*." "As the Secretary of State correctly explained when the Protocol was under consideration: '[F]oremost among the rights which the Protocol would guarantee to refugees is the prohibition (under Article 33 of the Convention) against their expulsion or return to any country in which their life or freedom would be threatened.'" *Stevic*, 467 U.S. at 428; see also CONVENTION, prbl. ¶ 2 (noting that these provisions were intended to address the international community's "profound concern for refugees" and "to assure refugees the widest possible exercise of [their] fundamental rights and freedoms").

The second paragraph of Article 33 describes two narrow categories of refugees who are not entitled to this protection, in view of the danger they would present to the host country:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, *or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

CONVENTION, art. 33(2) (emphasis added).

To bring the United States into conformance with the language and requirements of the Protocol and Convention, Congress enacted the Refugee Act. See *Cardoza-Fonseca*, 480 U.S. at 436. The Act reaffirmed this Nation's commitment to "one of the oldest themes in [its] history—welcoming homeless refugees to our shores." S. Rep. No. 96-256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 141.

As part of this same effort, Congress also amended the INA to add the provision codifying the method by which a refugee can obtain asylum. 8 U.S.C. § 1158; see *Cardoza-Fonseca*, 480 U.S. at 423. The United States will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

Congress further amended the INA to provide that the Attorney General cannot return any alien to a country if he concludes that the alien's life or freedom would be threatened there because of persecution. *Stevic*, 467 U.S. at 410-11. This form of protection—known as "withholding of removal"—was made

mandatory (that is, not discretionary) and is intended to codify our Nation's non-*refoulement* obligation under the Convention. See 8 U.S.C. § 1231(b)(3)(A); *Stevic*, 467 U.S. at 421 (noting that the U.S. can meet its obligations under the Protocol by providing either asylum or withholding of removal to an alien who meets the definition of a refugee). Eligibility for withholding of removal requires a demonstration of a "clear probability" that the alien's life or freedom would be threatened. *Stevic*, 467 U.S. at 424; see also 8 U.S.C. § 1231(b)(3)(A) & (b)(3)(B).[4]

In seeking protection in the United States, refugees generally apply for both asylum and withholding of removal. There are important differences between these two types of relief, however. For example, an asylee can work without an employment authorization document and can obtain an unrestricted social security card.[5] She may apply for a refugee travel document that will allow for travel abroad. See 8 C.F.R. § 223.1(b). And she

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[4] The United States, in contrast to other parties to the Protocol, requires a higher standard of proof to establish entitlement to withholding of removal than the "well-founded fear" standard that defines a refugee under Article I of the Convention (and that is the standard for asylum under U.S. law). GUY S. GOODWIN-GILL, THE REFUGEE IN INT'L LAW 136, 138 (1996); *Stevic*, 467 U.S. at 428. Withholding of removal is mandatory for refugees who meet this higher threshold, whereas asylum is discretionary. 8 U.S.C. § 1231 (b)(3); 8 U.S.C. § 1158 (b)(1); *see Stevic*, 467 U.S. at 428; *Cardoza-Fonseca*, 480 U.S. at 423.

[5] See U.S. Citizenship & Immigration Servs., *Types of Asylum Decisions*, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextoid=4a49549bf0683210VgnVCM100000082ca60aRCRD.

may apply to adjust her status to that of legal permanent resident one year after receiving asylum, putting her on the path to U.S. citizenship. See 8 C.F.R. § 209.2(a). In addition, as recommended by the Final Act of the Conference that adopted the Convention, in order to preserve family unity, an asylee can apply for derivative asylum status for her spouse and minor children. 8 U.S.C. § 1158(b)(3).[6]

While a refugee who is granted withholding of removal will still be protected from deportation to her country of persecution, she could still be deported to another country. She is also not entitled to bring her spouse and children to safety in the United States or to any of the other benefits of asylum described above.

II. U.S. law bars a person convicted of a "particularly serious crime" from both asylum and withholding of removal, and it equates a "particularly serious crime" with an "aggravated felony" under the INA.

In the context of both asylum and withholding of removal, Congress added language that tracks the exception in the second paragraph of Article 33. Thus it excepted any refugee who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community" from the benefits of both of these statutes. 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1253(h)(2)(B), *repealed and recodified*, 8 U.S.C. § 1231(b)(3)(B)(ii) ("the alien,

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[6] See also UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, ch. VI (Reedited 1992) ("HANDBOOK") (attaching recommendation of the Final Act of the Conference).

having been convicted by a final judgment of a particularly serious crime is a danger to the community").

Congress has generally equated "particularly serious crime" under the INA with the category of "aggravated felony." See 8 U.S.C. § 1101(a)(43); see also 8 U.S.C. § 1158(b)(2)(B)(i). "Aggravated felony," in turn, is defined by the INA to include the following, among other things:

> "murder, rape, or sexual abuse of a minor"
> 8 U.S.C. § 1101(43)(A)];
>
> "an offense that—relates to the owning, controlling, managing, or supervising of a prostitution business" [*id.* § 1101(43)(K)];
>
> "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year" [*id.* § 1101(43)(R)]; and
>
> "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, U.S. Code)."

8 U.S.C. § 1101(a)(43)(B).[7] As shown below, because an alien becomes ineligible to remain in the United States if she is "convicted of" an "aggravated felony," this Court's interpretation of those terms in this case could have dramatic implications for refugees who face a risk of persecution if they are returned to their countries of nationality.

A. A person who commits an "aggravated felony" is automatically ineligible for asylum.

As noted above, the U.S. will recognize a refugee's status and her eligibility for asylum if she can prove that she has suffered from past persecution or has a "well-founded fear of future persecution" based upon race, religion, nationality, membership in a particular

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[7] *Amici* note that the definition of "aggravated felony" extends by statute to foreign convictions, 8 U.S.C. § 1101(a)(43). Although it may be more appropriate to view foreign convictions through the "serious nonpolitical crime" bar in 8 U.S.C § 1158(b)(2)(A)(III), the agency now appears to apply the per se rules of 8 U.S.C. § 1158(b)(2)(B)(I) to foreign offenses. Compare 8 CFR § 208.13(c)(1) (current law) with 8 CFR § 208.13(c)(2) (for asylum applications filed before 1997, a crime could be particularly serious only if committed "in the United States"). Setting aside the potential problems inherent in relying on convictions imposed by oppressive regimes (see, *e.g.*, "Yaroslav Lesiv: Framed on Drug Charge," *The Ukrainian Weekly*, No. 16, April 17, 1983, at p.2 (available at http://www.scribd.com/doc/16333232/The-Ukrainian-Weekly-198316) (reporting that Ukrainian dissident was framed by the U.S.S.R. on false charges of drug possession); see also *Matter of B-*, 1 I&N Dec. 47 (BIA, A.G. 1941)), if a simple possession offense can be an "aggravated felony," that could mean that a refugee with a well-founded fear of persecution would be ineligible for asylum simply because of drug possession offenses committed in her youth, before she became a target of persecution and fled her home country.

social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A).

A refugee who has been "convicted of" an "aggravated felony" while in the United States, however, is automatically ineligible for a grant of asylum, notwithstanding her well-founded fear of persecution. See 8 U.S.C. § 1158(b)(2)(A)(ii) & (b)(2)(B)(i). As discussed above, Section 1158(b)(2)(A)(ii) of Title 8 provides categorically that asylum is not available to one convicted of a "particularly serious crime." It further provides that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i). These provisions thus erect an automatic bar to asylum for anyone who has been "convicted of" an "aggravated felony."

The implications of this bar to asylum are grave. As discussed above, a grant of asylum carries with it a number of important rights and benefits that assist a refugee and her family to become integrated into U.S. society, including the ability to work without an employment authorization document, to apply after one year to adjust her status to that of a legal permanent resident, and to apply for derivative asylum status for immediate family members. Under the Fifth Circuit's reading of the relevant statutes, then, a refugee will suffer grave consequences even if her only convictions were based on misdemeanor charges of simple possession—including, for example, where one of those possessions is for a single tablet of Xanax—as long as the Government can assert that she *could have been* charged as a recidivist offender.

B. A person who commits an "aggravated felony" is presumptively ineligible for withholding of removal.

A person who is not a U.S. citizen and lacks valid immigration status may be "removed" on that basis. Likewise, a person who has been granted legal status in this country, even a lawful permanent resident, can be "removed" if she is "convicted of" criminal conduct. As noted above, however, a refugee under these circumstances will be entitled to "withholding of removal" if she can show that her life or freedom would be threatened upon her return on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. § 1231(b)(3)(A).

"Withholding of removal" is not available if the Attorney General decides that "the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." 8 U.S.C. § 1231(b)(3)(B)(ii).[8] Although the

[8] The regulations implementing the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contain an identical exception barring "withholding of removal" for those convicted of "particularly serious" crimes. See 8 C.F.R. § 208.16(d)(2) (2001). Those convicted of "particularly serious crimes" do remain eligible for *deferral* of removal, which does not result in a grant of U.S. residency, does not necessarily result in a release from custody, and is subject to termination if the conditions change. See 8 C.F.R. § 208.17(a), (b)(i)-(iv). Furthermore, to establish eligibility for deferral of removal, an alien must establish that it is "more likely than not" she would be tortured by, or with the acquiescence of, government officials acting under color of law. *Id.* §§ 208.17(a), 208.18(a). Deferral of removal thus will not protect refugees who would face a probability of persecution in their home countries if that persecution does not meet the definition of "torture" or takes place without the requisite level of state involvement.

statute itself does not define the term "particularly serious crime," the final clause of Section 1231(b)(3) provides:

> for purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of the sentence imposed, an alien has been convicted of a particularly serious crime.

8 U.S.C. § 1231(b)(3) (final clause).[9] Thus, by statute, a refugee convicted of an aggravated felony and sentenced to at least five years of imprisonment is *automatically* deemed to have committed a "particularly serious crime" that bars her from receiving "withholding of removal." *Matter of Y-L-*, 23 I&N Dec. 270, 273 (A.G. 2002). If a state conviction for possession can be deemed a "conviction of" an "aggravated felony" under the statutes at issue here, then even a refugee with a suspended sentence could fall under this automatic bar to withholding of removal. See 8 U.S.C. § 1101(a)(48)(B) (five-year threshold includes suspended sentences).

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[9] Prior law provided that *all* aggravated felonies constituted "particularly serious crime[s]." See 8 U.S.C. § 1253(h)(2) (1994). That provision was later eliminated and replaced by the current definition of "particularly serious crime" contained in the last clause of 8 U.S.C. § 1231(B)(3) (cited above).

Indeed, even if the total sentence is *less* than five years, the barrier to receiving "withholding of removal" may still be nearly absolute. For other types of crimes, if a refugee receives a total sentence of less than five years, the Attorney General has discretion to conclude that the "aggravated felony" is *not* a "particularly serious crime" and hence does not bar withholding of removal. *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006) (citing 8 U.S.C. § 1231(b)(3)(B)(ii)). Under the Attorney General's decision in *Matter of Y-L-*, however, "aggravated felonies" with a sentence of less than five years that "involve[e] unlawful trafficking in controlled substances *presumptively* constitute particularly serious crimes." *Matter of Y-L-*, 23 I&N Dec. at 274 (overruling *Matter of S-S-*, Interim Decision 3374 (BIA 1999), which invoked a case-by-case review to determine which crimes are "particularly serious"). The Attorney General further concluded that only under the most "extraordinary and compelling" circumstances would departure from this interpretation be warranted or permissible. *Id.* He noted that, at a minimum, those circumstances would need to include *all* of the following criteria:

> (1) a very small quantity of the controlled substance;
>
> (2) a very modest amount of money paid for the drugs in the offending transaction;
>
> (3) merely peripheral involvement in the criminal activity, transaction, or conspiracy;
>
> (4) the absence of any violence or threat of violence, implicit or otherwise;

> (5) the absence of any organized crime or terrorist organization involvement, direct or indirect; and
>
> (6) the absence of any adverse or harmful effect of the activity or transaction on juveniles.

Id. at 276-77.

According to the Attorney General, only if *all* these criteria were present would it be appropriate to consider whether other, additional "unusual circumstances" justify departure from the presumption that drug-related aggravated felonies are always "particularly serious." *Id.* at 277; *Tunis*, 447 F.3d at 449. Additionally, the Attorney General has concluded that facts such as "cooperation with law enforcement authorities, limited criminal histories, downward departures at sentencing, and post-arrest (let alone post-conviction) claims of contrition or innocence" do not justify deviation from the presumption. 23 I&N Dec. at 277.

Although the convictions before the Attorney General in *Y-L* involved specific evidence of "trafficking," whether possession as a second or subsequent offense falls within the same category may depend on the outcome of this case. As this Court has observed, certain simple possession offenses—including repeat offenses—are "counterintuitively" defined as "illicit trafficking" offenses. *Lopez*, 549 U.S. at 55 n.6. If this Court were to adopt the Fifth Circuit's reading, there would be little to prevent the Government from applying the *Y-L-* presumption to any and all repeat possession offenses, no matter how counterintuitive that result may be.

To be sure, the *Y-L-* standard purports to create a rebuttable presumption and not a per se rule. See *Ford* v. *Bureau of Immigration & Customs Enforcement's Interim Field Office Director*, 294 F. Supp. 2d 655, 661-62 (M.D. Pa. 2003) (stating "[t]he Attorney General in *Matter of Y-L-* stopped short of creating a per se rule that all drug trafficking convictions constitute "particularly serious crimes"); 8 C.F.R. § 208.16(d)(3) ("[I]t shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime."). As a practical matter, however, the standard set out by the Attorney General in *Y-L-* is close to a complete bar on withholding of removal, simply because the exception is so narrow. For example, the third *Y-L-* criterion listed above—requiring "mere peripheral involvement" in the criminal activity or transaction—would not be met in the vast majority of simple possession cases, if the relevant criminal activity is understood to be the possession itself. And in any event, even if a given possession offense met all the *Y-L-* factors, that fact alone would not guarantee that "withholding of removal" would be granted.

As this discussion illustrates, this Court's interpretation of the terms "convicted of" an "aggravated felony" may have a significant impact on a refugee's ability to obtain asylum and to avoid *refoulement* to persecution in her home country. That impact cannot be ignored, particularly in light of the treaty issues to which we now turn.

III. The *Charming Betsy* doctrine compels a narrow reading of the definition of "aggravated felony."

This Court presumes that Congress intends its statutes to comply with the law of nations unless the statute unambiguously states otherwise. "It has been a maxim of statutory construction since the decision in *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * * .'" *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). Thus, a statute that is susceptible to more than one reading should be interpreted in a manner that avoids conflict with the international treaty obligations of the United States. This basic rule has been followed by this Court in a variety of contexts.[10]

Petitioner's opening brief explains in detail why "conviction of" an "aggravated felony" should be understood to include only those aggravated felonies for which the individual was actually convicted (as opposed to those with which she could hypothetically have been charged). To the extent that the definition of "convicted of" an "aggravated felony" is also

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[10] *Weinberger*, 456 U.S. at 29-30, 32-33 (looking to international law in interpreting statute prohibiting employment discrimination against U.S. citizens on military bases overseas unless permitted by treaty); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (in maritime tort case, looking to law of nations in determining statutory construction of Jones Act); *MacLeod* v. *United States*, 229 U.S. 416, 434 (1913) ("it should not be assumed that Congress proposed to violate the obligations of this country to other nations"); *Chew Heong* v. *United States*, 112 U.S. 536, 539-40 (1884) (interpreting immigration statute so as to avoid conflict with treaty right of Chinese alien to enter the United States).

susceptible of an expanded meaning, however—and the Fifth Circuit apparently believes it is—*Charming Betsy* dictates that these statutory terms be interpreted in a manner consistent with the Nation's treaty obligations. As discussed below, deeming a simple possession state misdemeanor conviction to be a "conviction of" an "aggravated felony" would put the United States in violation of its treaty obligations and implementing statutory provisions relating to the status of refugees. There is no reason to believe that Congress intended such a result.

A. The U.S. cannot be in compliance with the Protocol if it denies protection to those convicted of an offense that it does not otherwise regard as "serious."

The prohibition against *refoulement* to persecution is one of the core principles of the Convention (and of international refugee law generally). According to the Convention's preamble, its purpose is to ensure that refugees enjoy the widest possible exercise of the fundamental rights and freedoms guaranteed to all people. CONVENTION, prbl. ¶ 2. As discussed above, Article 33(1) of the Convention states that: "[n]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Thus Article 33(1) affirms the basic principle that a person must not be removed from his country of refuge and sent back to a place where his life or freedom would be jeopardized. And the "particularly serious crime" exception of Article 33(2) creates only

a very limited exception to the fundamental right to non-*refoulement*.[11] See James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L.J. 257, 293 (2001) (Article 33(2) authorizes *refoulement* to persecution only where it is necessary to protect the community in the host nation from an unacceptably high level of danger).

The structure of the "particularly serious crime" provisions in U.S. law supports the view that Congress could not have intended to make every simple possession that could possibly have been charged as a recidivist offense an "aggravated felony" for purposes of the INA. Article 33(2)'s exception applies, in relevant part, to anyone "who, having been convicted by a final judgment of a particularly serious crime, *constitutes a danger to the community of that country*." CONVENTION art. 33(2) (emphasis added). The statutory scheme that Congress enacted to implement that exception has been interpreted to begin and end with whether the person committed a "particularly serious crime," without any case-by-case determination of "dangerousness." See, *e.g.*, *Urbina-Mauricio* v. *Immigration & Naturalization Serv.*, 989 F.2d 1085, 1087 (9th Cir. 1993) ("[o]nce a court has determined that an alien has been convicted of a particularly serious crime, it need not make a

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[11] In the record of proceedings connected with the adoption of Article 33(2), the U.S. delegate explained that "it would be highly undesirable to suggest in the text of [Article 33] that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution." CONVENTION, *travaux préparatoires*. See Factum of the Intervenor, UNHCR, *Suresh* v. *Minister of Citizenship & Immigration*, S.C.C. No. 27790, at ¶ 63 (Mar. 8, 2001), *reprinted at* 14 INT'L J. REFUGEE L. 141, 155.

separate finding that the alien constitutes a danger to the community; the latter follows naturally from the former"); *Matter of C.*, 20 I&N Dec. 529 (BIA 1992) (rejecting proposed two-step inquiry that would include a separate assessment of dangerousness).[12] Thus, consistent with Article 33(2), Congress presumably limited the terms "particularly serious crime" and "aggravated felony" to include only those crimes that it believed necessarily make a person a "danger to the community." It would be inconsistent with that presumption to interpret the definition of "aggravated felony" to include the crime of possessing a small quantity of drugs, even if that possession was repeated.

Congress's use of the term "serious" in other, related contexts is also instructive. The offenses Congress identifies under its definition of "serious drug offense" in the main penalty provision under the Criminal Code involve either actual trafficking, participation in a continuing criminal enterprise, importing or exporting, or possession *with the intent* to "manufacture, distribute, or dispense" a controlled substance. See 18 U.S.C. § 3559(c)(2)(H) (citing 21 U.S.C. §§ 841(b)(1)(A), 848, 960(b)(1)(A)). Moreover, Congress penalizes those who commit a "serious drug offense" with a sentence of *ten years to life*. 18 U.S.C. § 3559(c)(2); see also 18 U.S.C. § 924(e)(2)(A) (a "serious drug offense" is defined as a federal offense with a maximum sentence of 10 years or more, or a state offense "involving manufacturing, distributing, or possessing with intent to manufacture or

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[12] This itself is a departure from the international standard. James C. Hathaway & Anne K. Cusick, *Refugee Rights Are Not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 537-38 (2000) ("Under the international standard, conviction by final judgment of a particularly serious crime is a necessary, but not sufficient, condition for removal.").

distribute" with a maximum sentence of 10 years or more). By contrast, the maximum federal sentence for simple possession of any drug other than cocaine base is only *three* years, even for repeat offenders. See 21 U.S.C. § 844(a).

By definition, the term "particularly serious crime" cannot include an offense that Congress does not otherwise regard as "serious." And given that the non-*refoulement* statutory provisions been found not to require a separate determination of "dangerousness," Congress must have intended the categories of "aggravated felony" and "particularly serious crime" to include only those crimes that necessarily pose danger to the community. For both of these reasons, to interpret the definition of "aggravated felony" to include a simple possession offense—even if it is not a first offense—would put the United States in conflict with the Protocol, based upon Congress's own standards for the relative seriousness of crimes.

B. UNHCR materials confirm that a "particularly serious crime" is one of extreme gravity.

Although the Protocol and Convention do not define "particularly serious," the U.N. High Commissioner on Refugees ("UNHCR") has provided guidance as to what types of criminal convictions could legitimately allow an exception to the obligation of non-*refoulement*.[13] Those materials demonstrate

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[13] The UNHCR was created in the wake of World War II to coordinate international action for the world-wide protection of refugees. Its primary purpose is to safeguard the rights and well-being of refugees. The U.S. is a member of the Executive Committee of the UNHCR.

that the possession of a small amount of drugs could not possibly qualify as a "particularly serious crime" that renders a person "a danger to the community."

For example, the exceptions in Article 33(2) are discussed in the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. While the Handbook does not have the force of law, it "provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes." *Immigration & Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). As relevant here, the Handbook highlights the fact that Article 33 permits a refugee's expulsion only in "extreme cases." HANDBOOK ¶ 154.

Indeed, the "particularly serious crime" exception in Article 33(2) is even narrower than Article 1(F) of the Convention, which states that the Convention does not apply "to any person with respect to whom there are serious reasons for considering that * * * he has committed a *serious non-political crime* outside the country of refuge prior to his admission to that country as a refugee." CONVENTION art. 1(F)(b) (emphasis added).[14] As the Handbook explains, "a

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[14] The history of these provisions confirms their relationship, as the discussions at the Conference of Plenipotentiaries specifically made note of the link between Article 33(2) and what was eventually to become Article 1F. GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES at 224 (1989). Therefore, Article 1(F) can aid how Article 33(2) is interpreted. See *id.*

'serious' crime must be a capital crime or a very grave punishable act" to fall within Article 1(F). HANDBOOK ¶ 155. "Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1(F)(b)." *Id.* Obviously, a "*particularly* serious crime" would need to be a crime that is even more grave than those "serious crimes" that fall under Article 1(F). See REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION ¶ 149 at 130 (Erika Feller, *et al.* eds., 2003) ("A common sense reading of Article 33(2) in light of Article 1(F)(b) requires that it be construed so as to address circumstances not covered by Article 1(F)(b)."); accord *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982) (recognizing that a particularly serious crime is more serious than a serious non-political crime).

Another source of guidance is the UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees ("GUIDELINES").[15] This document also discusses the exceptions in Article 33(2). The Guidelines emphasize that the second exception in Article 33(2) applies only to individuals who commit "particularly grave crimes". GUIDELINES ¶ 16. Further, they explain that "Article 33(2) concerns the future risk

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[15] See *Castillo-Arias* v. *U.S. Atty. Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("Reference to the UNHCR Guidelines * * * is permissible because the U.S. Supreme Court has held that Congress intended to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees."); *Mohammed* v. *Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (noting the UNHCR's "analysis provides significant guidance for issues of refugee law").

that a recognised refugee may pose to the host state." *Id.* ¶ 4.

Again, Congress presumably intended its statutory scheme to comply with Article 33(2) and to be limited to such "particularly grave crimes." A misdemeanor conviction for simple possession of a small amount of a controlled substance—even if the conviction could be deemed a felony conviction based on uncharged prior offenses—could not possibly meet that definition.

C. U.S. treaties relating to controlled substances also support the conclusion that simple possession cannot be a "particularly serious crime."

The treaties that relate to drug trafficking further suggest that simple possession cannot be a "particularly serious" crime under international law. The United States is party to a number of treaties on narcotics, including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Trafficking Convention"). See Martin Gottwald, *Asylum Claims and Drug Offences: The Seriousness Threshold of Article 1F(B) of the 1951 Convention Relating to the Status of Refugees and the UN Drug Conventions*, 18 INT'L J. REFUGEE L. 81, 93 (2006) (comparing provisions of the drug conventions with provisions of the Convention Relating to the Status of Refugees). "The cornerstone of the Trafficking Convention is Article 3 on 'Offences and Sanctions,' which distinguishes between 'criminal offences' (Art. 3.2), 'serious criminal offences' (Art. 3.1 and Art. 3.7) and 'particularly serious offences' (Art. 3.5)." Gottwald, *supra*, at 94. It is Article 3.2 of this Convention that requires signatory nations to

criminalize simple possession offenses, within the limits of their own constitutional law, whereas the other paragraphs of that article pertain to the actual sale and distribution of drugs. See TRAFFICKING CONVENTION, *supra*, art. 3. Under the Trafficking Convention, then, simple possession is categorized only as a "criminal offence" and not as a "particularly serious" or even "serious" offense.

Indeed, the Convention sets out a long list of factors to be considered before even a true drug distribution offense becomes "particularly serious." See TRAFFICKING CONVENTION, *supra*, art. 3.5 ("The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious * * * ."). Those factors may include the involvement of international organized crime; the involvement of the offender in other illegal activities facilitated by commission of the offense; the use of violence or arms; the fact that the offender holds a public office and that the offense is connected with the office in question; and the victimization or use of minors. *Id.* If even the *distribution* of narcotics is not "particularly serious" without facts such as these, then surely simple possession—even if repeated—is not "particularly serious."

CONCLUSION

In light of the implications of the issue for refugees and its impact on the Nation's compliance with its international treaty obligations and implementing statutes, Amici urge this Court to reverse the decision of the Fifth Circuit and hold that

the terms "conviction of" an "aggravated felony" do not extend to a state misdemeanor conviction for simple possession, even if that offense could have been charged—but was not—as a recidivist offense.

Respectfully submitted.

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